United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-6108

United States Court of Appeals

For the Second Circuit.

B

EDWARD KAVAZANJIAN, FRANK BENEMIO, EDWARD BERTELE, FRANK COSTAS, JOSEPH D'AMICO, JOSEPH FARRELL, ALEX FLASTERSTEIN, MARTIN GREENFIELD, JOHN MARTIN, ARTHUR OPPOLION, PETE SCALCIONE, AND, AS A CLASS, ALL INVESTIGATORS OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE LOCAL NO. 1917 (American Federation of Government Employees AFL-CIO), AND NATIONAL COUNCIL OF IMMIGRATION AND NATURALIZATION LOCALS,

Plaintiffs-Appellants,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, THE U.S. CIVIL SERVICE COMMISSION, and THE UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
JAN 26 1976
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SECOND CIRCUIT

Appellants' Appendix

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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RETURN TO COURT REPORTERS ROOM 803 FOR FILING

EDWARD KAVAZANJIAN, FRANK BENEMIO, EDWARD BERTELE, FRANK COSTAS, JOSEPH D'AMICO, JOSEPH FARRELL, ALEX FLASTERSTEIN, MARTIN GREENFIELD, JOHN MARTIN ARTHUR OPPOLIAN, PETE SCALCIONE, AND AS A CLASS ALL INVESTIGATORS OF THE U. S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE LOCAL NO. 1917 (AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AFL-CIO) AND NATIONAL COUNCIL OF IMMIGRATION AND NATURALIZATION LOCALS,

Plaintiffs,

vs.

69 Civil 3074

U. S. IMMIGRATION AND NATURALIZATION SERVICE, THE U. S. CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON and L. J. ANDOLSEK, MEMBERS OF THE U. S. CIVIL SERVICE COMMISSION, AND THE UNITED STATES OF AMERICA,

Defendants.

Before:

HON. MILTON POLLACK,

District Judge.

New York, June 18, 1975;
2.30 o'clock p.m.
(Room 519)

jks

APPEARANCES:

FRIED, FRAGOMEN & DEL REY, P.C.,
Attorneys for Plaintiffs;
BY: MARTIN L. ROTHSTEIN, Esq., and
LEONARD L. FINKEL, Esq.,
Of Counsel.

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York;
BY: TAGGART D. ADAMS, Esq., and
PATRICK H. BARTH, Esq.,
Assistant United States Attorneys;
Of Counsel.

Essentially, the grade level of a Federal employee is what it is all about for him financially.

The plaintiffs to this action, which is a class action, were classified at GS-11. We submit that they were underclassified by the Immigration Service, deliberately underclassified, in that the Service did not implement a standard which had been published by the Civil Service Commission governing the grades of investigators within the Service and which under 5 United States Code 5105, I believe it is, the Service is obliged to follow; that they were deliberately undergraded for budgetary reasons in order to keep their grade levels at a level that INS felt it wanted to pay, which was contrary, of course, to the letter and the spirit of Civil Service law.

We submit in particular that between the years 1959 and 1969 there was a deliberate policy on the part of the Immigration Service to keep the grades down.

We intend to introduce the testimony of witnesses, primarily that of plaintiff, Edward Kavazanjian, who was an elected official of the collective bargaining representative of the plaintiffs, as to the many efforts which he made beginning in 1963 in order to compel the Civil Service or to compel the Immigration Service to up-grade investigators in accordance with the standard and

jks

the resistance he was met with and the response which he both received and didn't receive from the Immigration Service.

Initially or additionally we have numerous documents which the parties have agreed to stipulate into evidence and which have been pre-marked.

I think with regard to this claim of deliberate undergrading the most important document is a report known as the Macy report in which the Civil Service Commission itself, in 1968, found that the Immigration Service had misapplied its classification program and had done so with the intention of keeping the employee grade levels low.

The document will be in evidence. Both parties have filed cross motions for summary judgment with lengthy memoranda which discuss all of the evidence.

The documents we are stipulating to are exactly the same documents which were the subject of both of our motions for summary judgment, plus additional documents which the parties deemed appropriate for trial. And there is a very full explanation of the documents by both parties in our motion and, additionally, plaintiffs have filed a trial memorandum discussing the high points of the case and the defendants have indicated to me that they also are filing a memorandum.

willing to come down and testify on Friday. It is most inconvenient for her. Her husband has been --

THE COURT: On Friday I will be in Washington.

MR. ADAMS: It would be inconvenient to have her testify then.

THE COURT: On business of the Committee on Court Administration, involving the personnel of the United States Courts.

MR. ADAMS: I made the suggestion -- I mentioned Friday, your Honor, because from my understanding from Mr. Rothstein and Mr. Finkel, they have somewhere between 15 and 20 witnesses that they intended to call. They expect to take a full day Thursday --

THE COURT: I don't intend to hear 15 or 20 witnesses on the same subject, nor do I intend de novo reviews of the function of the Civil Service Commission.

I have some misgivings as to what my authority is in overseeing the functioning of the Civil Service Commission, but it certainly is not to do the job that Congress put on them. It is merely to see whether they did the job in accordance with the standards for the services that they are required to perform. So just don't get the idea that this is a substitute Civil Service Commission.

jks

E D W A R D K A V A Z A N J I A N , called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Kavazanjian, what is your occupation?

A I am a criminal investigator for the United States Department of Justice, Immigration and Naturalization Service.

Q Mr. Kavazanjian, would you summarize briefly for the Court the positions which you have held with the United States Government?

A In 1951 to 1956, United States Food & Drug inspector.

1956 to 1962, criminal investigator, United States Treasury Department.

From 1962 to the present, criminal investigator, Justice Department, Immigration and Naturalization Service.

Q Would you outline briefly the positions and grade levels which you have held in your service with the Immigration and Naturalization Service?

A I entered the Immigration Service in March of 1962, GS-11, criminal investigator.

In 1967 I was awarded a classification of field

GS-12, criminal investigator, and I have been a GS-12 criminal investigator since June of 1967.

Q Mr. Kavazanjian, would you outline for the Court, please, the organization of the investigation section in New York between the years 1962 and 1967 or '68?

A There were approximately 180 criminal investigators divided up into categories of work. There was area control work, where aliens were apprehended substantively by searches.

There was a general investigation section that handled matters of a general nature.

There was a specialized fraud section which involved investigations of various frauds against the Immigration laws, and there was a special investigation section which comprised two units, one handling subversive activities and subversive personages, and one which I was assigned to, which handled criminal and moral, narcotic and racketeer category aliens and matters.

Q And for how long were you assigned to the criminal narcotics and racketeer section?

A Since March of 1962 when I entered the Immigration Service.

Q Beginning in 1962 through the year 1967, will you briefly describe your duties as an investigator with

the Immigration Service?

A From 1962 to the present time I was concerned with matters and people involved in criminal and moral, narcotic and racketeer type violations of Immigration and Federal laws.

When I first came to the Immigration Service, and I was hired directly in Washington, I was assigned to the Nassau-Suffolk County areas of the New York District specifically to handle violations of Immigration laws, liaison in all matters pertaining to criminal or moral, narcotic and racketeer violations of Immigration laws.

Q Would you describe for the Court, sir, exactly what an investigator does with a case, in general terms, so that we can understand just what your function and the function of the other investigators was?

A Well, briefly, when aliens violate any Federal law they are subject to arrest and administrative and criminal proceedings, so the criminal investigator's job is twofold, really, handle assigned investigations that come in for various reasons, various causes, and also work that arises out of his normal every-day occurrences. This is a vast area of responsibility and you are on call at all hours of the day.

THE COURT: Is it a vast area or is it a vast

responsibility?

THE WITNESS: Both, because aliens transcend all social levels, all types of occupations and their activities are subject to our investigation for purposes of enforcing the Immigration laws.

Q Will you give the Court a bit more detail on how and where these duties and assignments were performed, exactly what a man does who is an incumbent in an investigative position?

A Assignments are given to him by a supervisor. His job then is to analyze the case and to start to take his own independent actions and to bring the case to finality, either by an arrest, a report or some action that satisfies the United States Government and the supervisor that you have lived up to your duties and responsibilities.

Q When you say independent actions, can you say just what such actions involve, what exactly is done physically on a case by an investigator?

A There comes a point in the investigator's activities when he must makea decision either to arrest, either to apprehend for purposes of administrative procedure, to make decisions that involve some of the most serious consequences in human life, breaking up families,

taking aliens and processing them for deportation, prosecuting them for violations, aliens that have been smuggled across the borders, aliens that are involved in narcotic crimes, aliens that are involved in all kinds of immoral activities, perpetration of frauds -- there are decisions almost every minute of the day, and these are situations that arise spontaneously.

You are in a car; you get a radio call, go to so-and-so place or go to the court. The police have somebody who is arrested for some serious violation, or an alien has been complained by his wife and you go there and he jumps ship or he was smuggled across the northern border or he was involved in some illegal activity, gem smuggling, narcotics, runs the gamut of every single kind of crime that exists, because the category "aliens" covers everything, every kind of law violation, every kind of problem, every kind of social problem that exists, unemployment, employment, everything, but the decision is there for you to make. You make it in the field. There is no one to help you. And when you arrest the persons, that's it; you can't unarrest him.

Q How do you go about investigating, prior to apprehension; what kind of things does an investigator do?

A When the case comes to you, you have to make

decisions on who to talk to, where to go, whether or not you check employments, whether you cooperate with other agencies. You are completely independent. There is no one to tell you what to do.

Once a month, theoretically, your supervisor reviews cases that are assigned to you, but in most instances Immigration violations are spontaneous; they occur out in the field, in your area of responsibility or your area of work, so that you don't have a chance to do any second guessing. Plus the fact that there is so much work and so many violations that everything is independent judgment.

Q During your period with the Immigration Service can you tell us who your supervisors were and what their function was with respect to your assignments in cases?

A My first immediate supervisor from 1962 to 1970, until he retired, was Mr. Edward J. Farley, supervisor criminal investigator, and from 1970 or '71 to the present, Mr. Abraham Goodman. They were my supervisors and during that time they supervised me strictly from the office. At no time did they ever accompany me into the field. They gave me assignments. I told them assignments that arose out of my own work. They evaluated me and at all times they did nothing but supervise my completed reports,

my completed work, appraise me and make decisions on whether or not cases would go to certain areas for litigation and for final judgment.

Q During your employment with the Immigration Service did you hold any positions with the American Federation of Government Employees or any locals or affiliates thereof?

A Yes, I did.

Q What positions did you hold?

A From 1965 to 1966 I was the national liaison representative of Local 1917. In 1966 or '67 I became the president of the local here, and in 1966 I organized -- aided in organizing all the Immigration employees in the Immigration Service throughout the world and became the national president of all the Immigration employees throughout the world in 1967.

I was the president in the late part of '67, the national president, until 1971 of the National Council of Immigration Employees in the American Federation of Government Employees, AFL-CIO.

Q In the course of your union activities, did you have opportunity to become familiar with the way the Immigration Service was organized nationally?

A Well, I had occasion before that, from the time I came into the Immigration Service, before our union was formed. In fact, the union was formed because we ran into roadblocks and we couldn't move on

any matters of importance.

MR. ADAMS: Your Honor, I object to that answer as not responsive and irrelevant to the case.

THE COURT: Strike it out.

Q May I ask you again whether in your various positions with the union you became familiar with the organization of the Immigration Service?

A Yes, I did.

Q Did you also become familiar with the duties of other investigators and the roles of their supervisors in the course of your union activities?

A I did. I had direct contact with all investigators in New York and other parts of the country.

Q Based on that, sir, will you explain what the role of the supervisor was with respect to an immigrant investigator?

A An Immigration and Naturalization investigator supervisor supervises the case work and the decision-making that field investigators did on their own.

In other words, the supervisor was an office man. His job was to make assignments, to close an assignment, to sign reports, and to make recom-

this going to be a brief statement?

MR. ROTHSTEIN: It will be a brief statement.

THE COURT: I will take it subject to motion to strike it out.

Q I would like you to briefly explain to the court the kinds of cases you were involved in from 1962 through 1967.

A As a criminal investigator in the Immigration Service, I was involved in investigating cases of the highest complexity and the most important aspects of our national security and welfare. Specifically, cases conspiratorial or substantively pertaining to narcotics violation, narcotics rings, vice rings, all sorts of organized crime and only -- well, mostly cases that involved the most complex, sensitive issues in our American life and pertaining to aliens.

Q In December of 1963, were you called to testify before a committee of the House of Representatives?

A Yes, I was.

Q Very briefly, what was the nature of your testimony there?

A It was a case involving an allegation of

subversion that the House Committee on Immigration was interested in and it involved some sensitive issues, involving a party residing in Suffolk County, and the House wanted to know exactly what the situation was first hand from the investigator who handled the case.

Q What sort of issues were they when you say sensitive?

A A girl who married a very prominent American who was supposedly part of a spy ring behind the Iron Curtain.

Q At the time you were in Washington to testify, in 1963, did you have a conversation with Immigration and Naturalization Commissioner Farrell?

A I did.

Q What was the nature of that conversation?

A The nature was, Mr. Farrell asked me abouut the grades of the investigators and the type of work in New York, after I had raised an issue involving a standard that the Civil Service Commission had approved in 1959, whereby criminal investigators in the Immigration Service could be classified at the GS-12 level. This was 1963 and my query was, why hasn't the standard been impelemented and what can we do to bring the grade up to parity with Customs and Narcotics level, GS-12 and

GS-13?

Q What was Mr. Farrell's response?

A Mr. Farrell told me if I send him all the matters in details involving my personal work and the work in New York, he would give that to the associate commissioner of management handling classification in the Immigration Service and some steps would be recommended if it required and warranted it.

Q Would you briefly outline for the court the steps you took subsequent to that conversation and the capacity in which you took them with respect to obtaining higher grades for Immigration investigators?

A In 1964 I got a letter from Mr. Loughran saying he had received my appeal.

Q Who is Mr. Loughran?

A The associate commissioner for management. In that letter he stated the appeal would be adjudicated when he received a report from the Civil Service Commission who had conducted an inspection of our grades in 1963.

Q Mr. Kavazanjian, I show you Plaintiffs' Exhibit 4 and I ask you if this is the memorandum from Mr. Loughran to which you are referring.

A Yes, your Honor, this is the letter, and

it states --

Q It speaks for itself.

A Sorry.

Q Would you continue, sir, to outline the various steps that you took and responses you received and also if you would indicate the capacity in which you were acting?

A Towards the end of 1964 I was still just a plain investigator, I inquired of the Immigration Service about the appeal and again they said they were awaiting the Civil Service report and an answer would be forthcoming. This was a telephonic response, nothing in writing.

I think I was in Washington one day to see what was happening. In 1965, in the early part, I spoke to Mr. Thomas Casey, who was the personnel officer of the Immigration Service, and asked him about my appeal and he said to me that the appeal never existed, it wasn't an official appeal, and no answer would be forthcoming as to that appeal and the implementation of the 1959 standards approved by the Civil Service Commission.

A In 1965 --

MR. ADAMS: Your Honor, may I just point

out that I will object to the taking of that response as hearsay as to the truth of it.

THE COURT: It certainly is in that category, but under the new rules I am privileged to take hearsay and give it such weight as it may deserve.

A In 1965 I was a member of an organization called the Immigration and Naturalization Service Officers Association, and I prepared a very extensive brief with comparisons of other federal criminal investigators, and letters also that had come to our attention that in 1963 Mr. Loughran had answered responses on the GS-12 standard saying that supervisors were doing the GS-12 work and therefore there was no need to raise the investigators' grade to GS-12. I had gotten a copy of that letter and submitted it in this brief that was forwarded through the Immigration and Naturalization Service Officers Association to Washington in order that we get the GS-12 grade.

Q Mr. Kavazanjian, I direct your attention to Defendant's Exhibit at page 84, which is a letter signed by E. A. Loughran, associate commissioner for management, stating that:

"When responsibilities occur at that level, they are assigned to incumbents of supervisory personnel

as GS-12 grade level,"

and I ask you if that is what you were referring to.

A That is correct.

Q Will you continue with your description.

A In 1965 Mr. Thomas Gibney hand-carried this extensive brief to Washington and presented it to Mr. Loughran in order that we get some consideration of the GS-12 standard.

MR. ADAMS: May I object to that statement, whether that is within Mr. Kavazanjian's knowledge.

THE COURT: Objection sustained. The answer is stricken.

Q Do you know of your own knowledge,and, if so, would you state the basis of that knowledge, as to whether or not such a brief was delivered to the Immigration Service?

A May Mario Notto, the associate commissioner of operations, was present in Washington when Mr. Gibney brought that brief down to Washington to be reviewed by Mr. Loughran and Mr. Notto, who were joint commissioners, one management and and one operations.

Q Did Mr. Notto acknowledge to you that he had received such a document?

A On many instsances.

Q Will you relate for the record on which isntances he so acknowledged?

A The night of the meeting Mr. Notto, who is a personal friend of mine, he and I served in the United States Army together, called me at my home and told me Mr. Gibney had been down with the brief and that it had been read and chances were Mr. Loughran would not implement the GS-12 standard.

Q Did you yourself see a copy of that brief?

A I prepared the brief.

Q Will you outline briefly the kind of things that were contained therein without going into detail, elaboration --

A There was a chart of all criminal investigators in the government, including FBI agents, Narcotics agents, Customs agents, Wage and Hour investigators, Civil Service, FBI, all the different activities each investigator would do, issue order to show cause, seizing property and goods, arresting in border areas, and all of these comparisons were in a chart to show the Immigtation investigator in the field no higher than Grade 11 did more substantive work, more criminal and more complex, important criminal investiga-

tion than even an FBI agent.

Q Based on your knowledge of the function and role of the Immigration inspector, did that document contain a comprehensive analysis of the functions of the GS-11 immigrant inspectors as they were actually being --

A Excuse me. You mean --

Q Investigators. I stand corrected.

A That start had been compiled and in fact about a year ago when I was in Washington the assistant commissioner pulled out a chart and said, "This is your chart and we still have it here. It was completely accurate."

Shall I continue my narrative.

Q Were there any further steps that you took prior to 1966 in attempting to obtain implementation of the standard for Immigration investigators?

A In 1965 Mr. Robert Hoffman and Mr. Edward Burtell, also investigators, accompanied me to a meeting at a restaurant in New York attended by an investigator for the United States Civil Service Commission.

Q Do you remember the name of this investigator?

A I do not remember his name. It was not given to me and I don't know it to this date, but he

was a personal friend of Mr. Robert Hoffman.

Q Do you know if he was there in an official capacity.

MR. ADAMS: I object to that question.

THE COURT: He asked him whether he knew so I suppose the question is answerable on the basis of personal knowledge, if there was in fact personal knowledge.

MR. ADAMS: If there was in fact personal knowledge.

THE COURT: I don't know until I get the answer. You can move to strike it out if there wasn't personal knowledge.

Do you know anything about it personally?

THE WITNESS: Yes.

THE COURT: What is the source of your knowledge?

THE WITNESS: I was there.

THE COURT: How did you know in what capacity the gentleman was there?

THE WITNESS: It was after hours.

THE COURT: From that you drew an inference?

THE WITNESS: Yes.

MR. ADAMS: I may be mistaken. Was he in his official capacity or unofficial capacity?

THE COURT: I understood he said he was there in an official capacity.

Is that right?

THE WITNESS: No, unofficial. He asked me if it was official or unofficial. I haven't answered that.

MR. ADAMS: It was unofficial?

THE WITNESS: Yes.

THE COURT: You may proceed.

Q What was said at this meeting?

A This Civil Service investigator presented us with a document, a copy of a report made by the United States Civil Service Commission of an inspection in 1963 at the Immigration and Naturalization office at 20 West Broadway, New York City, New York. That document contained recommendations and directed the Immigration Service to implement GS-12 criminal investigator positions.

MR. ADAMS: Your Honor, I move to strike that answer. The document is in evidence and I think it speaks for itself.

MR. ROTHSTEIN: I agree with counsel's

statement.

THE COURT: Motion granted. Strike out the statement.

Q I show you Plaintiffs' Exhibit 5 and I ask you if this is the document you are referring to.

A This is the document, yes.

Q Were there any further steps which you took to attempt to convince the Immigration Service to implement the 1959 standard?

A On the basis of that document I made personal inquiries. I went to Washington personally and inquired of my union, which had just organized us and we had just become members of, the American Federation of Government Employees, to investigate why this document had not been acted upon and whether or not the Immigration Service had received it.

I also went to the Immigration Service on the same day.

Q Whom did you speak with in the Immigration Service?

A Mr. Thomas Casey, personnel officer, and I showed him a copy of that report and I asked him if this report had been received by the Immigration Service, and he refused to answer my question.

Subsequent to that, we advertised the fact that we had that report. We sent it throughout the Immigration Service. We had some of our members send it to members of Congress. We sent it to Senator Clifford Case, Mr. John Macy, the director of the Civil Service Commission, for his opinion on whether or not this report was factual and why the GS-12 standard hasn't been implemented since the recommendation was contained there?

Q Did any official of the Immigration Service ever indicate to you when this document had been received by the Immigration Service?

A Well, some information came back to us that the Immigration Service had spoken to various members of Congress and said that they had never received this report.

MR. ADAMS: I object to that testimony.

THE COURT: Objection sustained.

Q Did you ever discuss with Mr. Esperdy, the district director in New York, the time at which this document had been received by anyone in the Immigration Service?

A Yes, sir. I took that document up to Mr. Esperdy, the district director in New York in

1965. I showed it to him. He looked at it and he said he had seen the report, it had been given to him, and it was actually factual.

Q Did he indicate when he had seen it?

MR. ADAMS: I object to that testimony.

MR. ROTHSTEIN: I think it is part of thisliti-gation and admissible.

THE COURT: I will let it stand albeit it is hearsay and consider it in the light of all the facts and circumstances.

Q Did he indicate to you, sir, when the document had been received?

A He said he had received it some time in early 1964; since it referred to the New York district, he had gotten a copy of it.

Q Was this before or after you stated you had received a letter from the Immigration Service indicating they were awaiting the results of a survey by the Civil Service Commission, meaning the date Mr. Asbury said he received it?

A I can't answer that question. I don't remember that.

Q Were there any further steps that you took prior to the filing of formal classification appeals

Q Did you have any conversations prior to that with anyone in the Civil Service Commission as to the way the appeals would be handled?

A Some time prior to my audit, when he first came in to the Immigration office, he walked up to me and announced who he was and stated that the appeals would be starting soon, that he would conduct audits of everybody's work, would make an evaluation, and that he would base his evaluation on the amount of higher grade work that he found the men to be doing.

He stated to me that if he found from 20 to 25 per cent of the higher grade work he would reclassify any claimant.

Q Is there any name for the rule under which he would classify people with 20 to 25 per cent higher level work?

A Yes. This is called the exception to the majority rule in the position classification standards for the United States Civil Service Commission.

Q Is there another name for it so the record will be clear?

A It is called the substantial rule, where a person is doing only a substantial amount of higher grade work.

Q When you spoke with Mr. Friedman, can you state whether or not you were speaking as the representative of all of the appellants?

A Yes, I was.

Q Was Mr. Friedman aware of that?

A Yes, he was.

Q How do you know he was aware --

MR. ADAMS: I object.

THE COURT: Sustained.

Q Did you make known to Mr. Friedman the fact that you were speaking as the representative of the 52 appellants?

A Yes, I told him I was an official in the union, designated by the president, and that I would be the one to coordinate the bringing of the people to him and doing whatever he needed from our end to get these appeals adjudicated.

Q Did he indicate to you that he was speaking to you in a representative capacity, that you were in a representative capacity? In other words, did he accept your statement and did you proceed under the assumption that you were speaking for everyone?

MR. ADAMS: I object to that.

THE COURT: Sustained.

Q When you discussed with Mr. Friedman the way

the audits would be conducted, what statements did he make to you, if any, about the need in this kind of an appeal to speak personally with all of the appealing investigators?

A He stated that this was the largest mass appeal he had ever handled and that it involved people working in different areas and in order to do it properly he would have to do comprehensive audits of all the work and to get a good evaluation of what each man is doing.

Q Did he tell you what he meant by a comprehensive audit?

A Comprehensive audit meant that he would do on site desk audits. Look at cases and record all of the activities for the men for the previous one year.

Q What happened subsequent to this conversation you had with Mr. Friedman?

A He audited me.

Q Would you tell us when this audit took place?

A The last week of July 1966.

Q Do you know if anybody had been audited before you?

A I don't know, but he told me that I was the first one.

Q Would you describe exactly how this audit was conducted?

A We sat in a room, a desk between us; he had a pad and pencil and he said to me, "Tell me what you do and your work and the type of cases and your responsibilities."

I began to inform him exactly of my duties. I told him of my responsibilities specifically in the geographical area of Nassau and Suffolk County, my work on the top priority racketeer cases, my assigned liaison with the police, with the judges, with probation out there to inform them about Immigration law violations and how the Courts should handle sentencings in our parts and all the complex cases I worked on, the conspiracies and all the matters that I thought was indicative of my higher grade.

Q How much time did Mr. Friedman spend with you?

A I would say about two hours.

Q Did he take notes?

A He took numerous notes.

THE COURT: What date was this?

THE WITNESS: It was the last week in July of 1966. I don't know the exact date, but it was towards the end of July of '66.

Q Did he make any statements to you about his views on the value of your cases?

A No, he just recorded everything. He asked me about what I thought was the important cases, and then I

gave him a list of a number of very, very important cases that I devoted all of my time to, large vice investigation of housewives that were involved in vice, a big marijuana smuggling case involving a numerous amount of Jamaicans, all the top priority racketeers I was working on to try to revoke their naturalization or to get them deportable, and then the serious crimes involved, robberies and burglaries and narcotics smuggling.

I gave him a ist of them and I told him that this was the basis of my work, and then I set out all my liaison work for the representative of the Immigration Service for those two counties.

Q As a union official and as the coordinator of the appeals were you aware of Mr. Frieman's subsequent activities regarding audits of the 52 appellants?

A Every single --

Q Just answer the question. Were you aware?

A Yes, I was.

Q How did you become aware of those activities?

A As the coordinator, our plan on these appeals, in order that we get some semblance of what the organization was by the Civil Service Commission, was that each man was to let me know when he was to be audited, if he was going to be audited, so we could see if everybody was

audited or not.

Q Were these reports made to you in the regular course of union business?

A They were made to me, union business and on regular working hours, since classification appeals are official duty.

Q What did you learn of Mr. Friedman's subsequent activities after he had audited your position?

A I know that immediately after I was audited he audited Mr. Jack Lazarus, the president of the union. This was also in late July or early August. In fact, I think it was the same day, if I am not mistaken.

Q Did he audit anyone else at about that period?

A Nobody else was audited that I know of, and a number of months ensued and Mr. Friedman never showed up. Nothing was done until some time late in the fall or the middle of the fall.

Q What happened at that time?

A In the middle of the fall Mr. Friedman appeared at the New York office with numerous other Civil Service people and they began a systematic interview of the other people or some of the other people on the appeal.

Q Do you know when Mr. Jack Riccardi was audited?

A My knowledge of Mr. Riccardi's, I can't speak

establish that it is fundamentally unfair for any adjudicator to tell somebody at the beginning of a hearing or in adjudication that one rule, one guideline will be applied, and then suddenly to turn around and apply a stricter standard.

THE COURT: How would it change the facts?

MR. ROTHSTEIN: Well, it changes perhaps the presentation that would be made.

THE COURT: You mean that thee person presenting the material would tailor his evidence to the rule?

MR. ROTHSTEIN: No, but he would make a much greater effort to convince the adjudicator that he was over the 50 per cent mark if he knew that was being applied then he would if he believed that only a 25 per cent rule would be applied, and if he was already over that --

THE COURT: Well, I find it very difficult to follow that standard of an evidentiary inquiry. It seems to me that the evidence cannot be said to change dependent upon the rule to be applied unless the argument is made that the witnesses were prepared to tailor their evidence accordingly.

I sustain the objection.

Q Did you have any other conversations with Mr. Friedman prior to the decisions?

MR. ROTHSTEIN: Also, just for the clarity of my statements on the record, I certainly did not mean to imply before that any of the appellants would have tailored their testimony in order to fit the standards, but only the effort, the degree with which they would have tried to persuade --

MR. ADAMS: I think we should have testimony from the witness on this point.

THE COURT: That's right. I think so. It will go the question of the good faith of the plaintiffs if the contention is now made that they held back evidence that they might have presented.

Go ahead. Ask your questions.

BY MR. ROTHSTEIN:

Q Did you have any further conversations with Mr. Friedman with regard to whether the majority or substantial time rule would be applied?

A I did.

Q Would you explain the nature of those conversations?

A After he resumed his audits, one of the investigators came to me and told me that Mr. Friedman had told him that 50 per cent would be needed to substantiate the higher grade.

I asked Mr. Friedman why this change had been made and Mr. Friedman said to me because the position classification standards in this case call for 50 per cent of the higher grade work and that in his opinion this was the rule to be applied in New York.

THE COURT: Did you request any further opportunity on your behalf or anybody else's behalf to add to the evidence already placed in Mr. Friedman's hands after learning this fact?

THE WITNESS: I did not, your Honor.

THE COURT: Was there any other evidence available that could have been presented to amplify what had already been told to Mr. Friedman in order to come within the umbrella of the 50 per cent rule?

THE WITNESS: On my behalf, your Honor?

THE COURT: Yes.

THE WITNESS: Not that I know of, no, sir.

THE COURT: Do you know of any on behalf of any other person with whom you were associated or represented?

THE WITNESS: I cannot answer that question. I do not know, your Honor.

THE COURT: All right. It seems to me that that precludes the subject.

MR. ROTHSTEIN: Except that I will have other

witnesses, your Honor, and it is possible that some of them might have answers to the questions.

THE COURT: All right, but it makes Mr. Adams' objection all the more binding.

Q In February of 1967 you received letters of decision on the appeals and what was the result in your case?

A I was denied a reclassification.

Q Did you speak with Mr. Friedman after you received a letter of denial?

A I did.

Q And what was the nature of this conversation?

A I asked him where the evidence was, and he said that there were appeals folders that contained the information and that we had the right to ask the Bureau of Inspections to reconsider our cases.

I also asked him whether or not the decision that said I was not doing a majority amount of work, whether there was any fixed amount of percentage that I was doing, because the decision letter just said you are not doing a majority of the work of the Grade GS-12, and I said to him what is the percentage I was doing?

He said, "Well, I don't have to tell you that."

He said, "All I know is you weren't doing over

50 per cent and that's it."

I asked him how he reached the mathematical conclusion.

He said he didn't have to answer that question, that he was an expert in thefield and that his decision was that.

Q Did you discuss with him at all how he had reached his negative conclusions in other cases?

A I asked him about the general formulas he used and whether the other cases in the appeals folders would have percentages. He said no. He said, "I don't have to have any figures or anything else."

He said, "I am an expert on classification and my decision is based on what I see and what I evaluate.

THE COURT: Was he, in your opinion, an expert on classification?

THE WITNESS: If you are asking me now, after the fact, from the job he did, I would say no.

THE COURT: In other words, your disappointment reduced your level of appreciation of his expertise?

THE WITNESS: That's correct, because there was no factual --

THE COURT: Up to the time that he decided against you, you thought he knew his business?

THE WITNESS: Well, I hoped he did, yes, sir.

THE COURT: All right.

THE WITNESS: But I --

THE COURT: Of course, you know sometimes that occurs when a liitgant finds himself at the short end of a judgment; he promptly thinks that the judge doesn't know his business.

THE WITNESS: That's true, your Honor, but I think the record will speak later on.

THE COURT: All right. I trust that you won't have the same view of this case if it should happen by any mischance to go against you.

BY MR. ROTHSTEIN:

Q Mr. Kavazanjian, after speaking with Mr. Friedman, did you subsequently attempt to review your appeals file folder to prepare an appeal to the Bureau of Inspection?

A I did.

Q And how did you go about this review?

A Mr. Jack Lazarus, the president of the union and myself, visited the United States Civil Service Commission office at the News Building in New York City.

Q How did you know that this was the office to which you were to go?

A Because we had made an apointment to see

Mr. Baer, to discuss the appeals of the appeals.

Q And who was Mr. Baer?

A Mr. Larry Baer was the District Regional Director of the United States Civil Service Commission for the Second District.

Q Did he indicate to you that the appeals files would be available for your inspection?

A He stated that there would be appeals files to be reviewed by all of the appellants who wished to ask for a reconsideration.

Q And can you tell me when you went to the Commission building?

A Some time the first week in March.

Q And who did you go with, if anyone?

A I was accompanied by a number of other investigators.

Q Do you remember who they were?

A Mr. Lazarus, Mr. Benemio, Mr. Sena, Mr. Bertele, Mr. D'Amico. There were about six or seven of us.

Q And did you all go there with the same purpose?

A We went to review our appeals folders.

Q Who did you speak with when you got there?

A Mr. John Sauerhoff.

Q What was his position?

A He was the chief of management and personnel evaluation.

Q Can you state for the record what you said to him and what he said to you at that time?

A I said, "We are here, Mr. Sauerhoff, to review our appeals folders."

Q What did he say?

A He said, "All right. I'll find an area for you. I'll get the folders and each man will look into his own folder and copy the records, the basis for the evaluations," and that's it.

Q And did he subsequently give you and the other men folders?

A Yes. He walked and gave each man there that day a folder to look at.

Q Was your name on the folder?

A My name was on my folder.

Q Will you state, sir, what you saw inside the folder when it was given to you?

A Inside my folder, the only thing in that folder was a letter from Mr. E. A. Loughran, associate commissioner of management, to Mr. L. H. Baer, the director of the Civil Service Commission, having to do with a claim that we had made, in my area, criminal or moral narcotic of

Immigration, for the title designation of criminal investigator.

Q Was that part of this classification appeal?

A It was a collateral issue that 15 of us had done, but not part of this classification appeal, no.

Q Was there anything in the file relating to this classification appeal?

A Not one single document whatsoever.

Q Were Mr. Friedman's notes that you testified he had made in that folder?

A No, sir, they were not.

Q Did Mr. Sauerhoff indicate to you that this was the folder that reflected the evidence in connection with your classification appeal?

A I took the folder in my hand and went to Mr. Sauerhoff and I said, "Is this the record that I am to base my reconsideration on?"

And he said, "Everything that was used and everything that is the basis of your decision is in that folder. That's your appeals folder."

MR. ADAMS: I object to that. It's hearsay.

THE COURT: What are you doing, objecting to the accuracy of the statement or to the competency of it?

MR. ADAMS: I am objecting to the statement

going in except for the basis that it was -- as to any allegation as to the essence of what the fact was.

MR. ROTHSTEIN: I think it is an admission by an official of the party defendants.

MR. ADAMS: I don't see how it is an admission.

THE COURT: The objection is overruled.

Q Had you completed your answer, Mr. Kavazanjian?

A I have.

Q While you were there, did you have opportunity to review the contents of the files that were given to the other men who went with you?

A Yes, some of the men who were with me showed me their folders.

Q What did you see in those folders?

A In one of the folders there was a small index card. One folder was empty. Another folder had a bunch of scrap paper in it, unintelligible, and in amazement, everybody said they were amazed that there was nothing in there that they could use from the basis of reappealing.

THE COURT: Mr. Kavazanjian, you knew that there was more material that should have been contained in your folder, didn't you?

THE WITNESS: Yes.

THE COURT: Did you ask for the additional

material that you knew had been considered in your case?

THE WITNESS: I did. Not at that minute.

THE COURT: Who did you ask it for?

THE WITNESS: Mr. Friedman, when I saw him subsequently.

THE COURT: How about this man who had custody of the files, did you ask him?

THE WITNESS: I asked him if this was all the materials and he said, "Yes, this was it."

THE COURT: This was all the material he was showing you, but did you ask him for the rest of the material that had been considered?

THE WITNESS: I did not, your Honor.

THE COURT: But you did know that there was other material considered and so did each of the other men?

THE WITNESS: There should have been, yes, sir.

THE COURT: All right.

Q Did you subsequently have any conversation with Mr. Friedman regarding the files?

A I did.

Q Would you relate to the Court the substance of that conversation?

A I saw Mr. Friedman again when he came into the

Immigration Building after the appeals had been refiled, the reappeals, and I walked up to Mr. Friedman and I said I had reviewed my appeals folder and I saw nothing in there having to do with his interviews or the notes and I was amazed that a decision, a mathematical conclusion of over 50 per cent not being done had been reached without any mathematical basis.

I asked him, "How did you compute my hours? How did you find out that I wasn't performing at this higher level 50 per cent of my time?"

And he replied to me, "I don't have to. I'm an expert in this. I made my decision based on my observations and I don't have to give any mathetmatical deductions whatsoever."

THE COURT: Did you ask him for his notes?

THE WITNESS: I did not, your Honor.

Q Did you ever get to see those notes, Mr. Kavazanjian?

A I saw those notes about a year ago when the documents were supplied to our attorneys and I saw the copies of the notes that he took on that date. In fact, I remember that the date was on them.

MR. ROTHSTEIN: I would like to state for the record that the documents were not made available to

plaintiffs, the notes Mr. Kavazanjian is referring to, by the defendants until May 7, 1974, and this is only after an order had been signed by Judge Griesa ordering their production if they could be found, and the order had been phrased that way because the Commission had represented to the Court that the notes could not be found.

If that is not a correct statement I will ask Mr. Adams to clarify it, if I have in any way misrepresented the situation.

MR. ADAMS: No, I really don't want -- well, yes, I will clarify it to this extent:

The notes of the audits, most of the audits, have not been located. This action was filed in 1969, three years after these audits were done. It is not the practice of the Commission to keep notes that long.

I have gone to Washington -- the attorney this case before me had gone to Washington, requesting anything of this nature. We were advised they were not kept in the normal course.

I personally walked over to the Civil Service office at 26 Federal Plaza in May of 1974 and said, "I would like to somebody to take another look" because there was a question, would they be in Washington or would they be in New York because of the second stage of the appeal.

At that time they did take another look and then they took a third look and on the third look they found two sets of notes involving Mr. Kavazanjian and Mr. Lazarus.

The minute I got those notes they were turned over to plaintiffs' counsel and they are stipulated in the record.

THE COURT: These are Friedman's notes?

MR. ADAMS: Yes, Mr. Friedman's notes.

THE COURT: All right.

MR. ROTHSTEIN: I would just note for the record that we are tendanced, of course, that the United States Attorney's office has made everything available to us just as soon as it was received from the Commissioner. The point is it wasn't received from the Commission, although many years have passed -- the case has been in litigation since 1969, which was only about three years or less after the notes were made, and I would submit by way of argument that an administrative agency has an obligation to preserve the records on which a decision is made pending a judicial review.

THE COURT: Well, an employee who seeks a grade classification and a step up in pay doesn't sit around waiting for three years in a meritorious claim unless he is in some way hobbled so that the delay of three years in

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Q Mr. Kavazanjian, moving along, did you appeal to the Bureau of Inspections in March, 1967?

A I did.

Q Did the others who had lost their appeals in the New York Region appeal also?

A I believe about half of them did, 28 or 30.

Q Will you describe what happened subsequently in the prosecution of these appeals?

A Some time in April or May of 1966 -- '67 -- I'm sorry -- a team of Civil Service auditors came to the Immigration Service to do further review of our work and I was interviewed and made some submissions to Mr. Tassel, who spoke to me.

Q What was the result in your case?

A In June, 1967 I was reclassified GS-12, found to be doing more than the majority of my work in the GS-12 level.

Q Have there been any changes in the kind of cases you were working on from 1963 to 1967, when you received your promotion?

A None whatsoever.

MR. ADAMS: I object to that as an opinion.

THE COURT: That's his opinion. Maybe

level?

A The end of June, 1967.

Q Did you at any time receive any back pay or retroactive compensation for the years that you have been working with the Service prior to receiving the upgrading?

MR. ADAMS: Your Honor, I am objecting to this line of questioning which I assume goes to the issue of back pay, which is not properly part of the suit.

THE COURT: Without ruling on the issue of law, I will take the evidence merely for the completeness of the record and by taking it, I don't indicate that it is relevant.

MR. ADAMS: May I just point out it is an agreed-upon fact, that Mr. Kavazanjian was not paid at the GS-12 level until he was made a GS-12 investigator.

THE COURT: All right.

Q Mr. Kavazanjian, in July of 1967 did you have a meeting with a Mr. Schulkind in Washington, D.C.?

A I did.

Q What was his position?

A Director of the Bureau of Inspection of the

Commission.

THE COURT: All right.

Q Mr. Kavazanjian, in this meeting which took place in July of 1967 what was said by Mr. Schulkind with regard to the majority-of-the time rule?

A He told me at that meeting that it was possible in the Immigration Service to use three different systems for evaluation of people upgrading. It was possible to invoke a majority rule in New York where 50 per cent of the higher grade work had to be done, a substantial rule in Texas where only 20 to 25 per cent of the work had to be done and 10 to 15 per cent of the higher work in California where only 10 per cent had to be done in order to give a man a GS-12 grade.

Q Did he indicate to you whether or not in fact these three different standards had been implemented?

A He recognized the fact and he admitted it. In fact, I got a letter later on substantiating the fact that this did exist, that there were three different standards.

Q I am concerned right now with the conversation that you had. What did he say by way of whether or not the three standards were in effect being

used in the areas you mentioned?

A He said they had been used by the Immigration Service with the approval of the Civil Service Commission.

Q Did he indicate in what particular areas the different standards had been applied and whether they had been applied to investigators?

A They were applied to criminal investigators.

Q In which areas?

A In the New York district, in the El Paso district of the Immigration Service, which would be the Dallas district of the Civil Service Commission, and in the Los Angeles district.

Q Did he indicate to you any justification that the Commission was giving for the discrepancies in application of the three standards?

MR. ADAMS: Are we referring to the letter or the conversation?

MR. ROTHSTEIN: My question refers to the conversation.

A The conversation developed the fact that the Immigration Service had substantial leeway to differentiate the exigencies of the work or how the work was divided in the different areas of the United States,

better to let the witness give the testimony so I don't get the impression that Mr. Rothstein's evidence is the evidence rather than Mr. Kavazanjian's testimony is the evidence.

MR. ROTHSTEIN: With leave of the court I would like to ask one more leading question in --

THE COURT: I am not preventing you. I am merely saying it makes the responses suspect and you should be aware that a trier of fact may so consider it.

Q In the course of your conversation did the expression "mine run of work" come up?

A Mr. Schulkind's explanation had to do with so-called mine run of work. His explanation was in some of the areas in the Immigration Service there were geographical responsibilities and they have to run the mine run of work, the everyday, routine types of assignments, and this dilutes their work.

MR. ADAMS: It was the previous testimony Mr. Schulkind did not give any facts.

THE COURT: Let it stand.

Q Are you familiar, sir, personally, with the actual work assignment situation in the Northwest or Southwest region of the Immigration Service.

A I am.

Q What is the basis of your familiarity?

A I have done assignments and worked in Brownsville, Texas, I have been in El Paso, Dallas, Los Angeles, Miami as an investigator, both as an investigator and my union capacity.

Q When you say union capacity, you are referring to what capacity?

A National president of the Immigration, Naturalization employees.

Q You testified before, of course, that you were familiar with the situation in the New York district, where you had worked and served as a union official, is that correct?

A Yes, sir.

Q Based on your familiarity with the geographic areas and based upon your knowledge and years of experience as an immigration investigator, would you compare the work situation and the other districts you mentioned with the so-called assignment of the mine run of work of investigators?

A The same situation exists throughout the Immigration Service. Work is assigned to men according to specialties or the geographical locations where

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Kavazanjian, I just wish to clarify a couple of matters.

You have been classified as a GS-12 investigator since June of 1967, is that correct?

A Yes, sir.

Q You were classified at that grade as a result of the appeal you filed in 1966?

A The original appeal and then reappeal.

Q It was the same appeal that had been filed originally in 1966 and then was reviewed in Washington?

A That's right. That's correct.

Q Had you applied to the Civil Service Commission with regard to your classification prior to the appeal you filed in 1966?

A I did not, no.

Q But you had applied with regard to the appeal you had as to whether you were a criminal investigator or general investigator, had you not?

A That was done simultaneously in '68.

Q And you now are a criminal investigator?

A Yes, sir.

Q You are now classified under GS-1811 Schedule?

A That's correct.

Q Previously when you were a general investigator that was a GS-1810 Schedule?

A That's correct.

Q When you discussed the scope of your duties, Mr. Kavazanjian, the investigations that you undertook, those were for violations of immigration laws, is that correct?

A And federal laws in some instances.

Q But if it was an alien who ran through a red light, an investigator from the Immigration Service would not investigate that?

A No.

Q You wouldn't investigate violation by aliens of other laws than the immigration laws?

A That's correct.

MR. ADAMS: May the record reflect I am going to hand Mr. Kavazanjian a copy of what is now Exhibit 4, a memorandum dated March 28, 1964, and down at the bottom it says"Exhibit D."

Q Mr. Kavazanjian, is that the document which you testified to and said the Immigration Service refused to adjudicate your appeal?

A That's correct.

Q Isn't that document more directed toward the classification standards and not your position?

A I had sent the appeal down for myself, which of course would refer to the standard that was in the administrative manual. I agree, yes. The occupation, that's correct.

Q Does this not refer to your letter about the grades of the investigators, in the plural?

A Yes.

Q That wasn't an individual appeal you filed?

A It was my individual appeal. Of course it was.

Q Do you have a copy of that letter?

A Do I have a copy of it?

Q That is referred to in that memorandum?

A I might. I would have to look through my notes.

Q In 1966, Mr. Kavazanjian, you appealed with 54 other general investigators, appealed your GS-11 classification, precisely?

A Yes, I did.

Q And you were interviewed by Mr. Friedman?

A Yes, sir.

Q I believe you testified that that interview

took about two hours?

A That's correct.

Q Was there anything that you wanted to put into your submission in support of your appeal that you didn't tell Mr. Friedman?

A I had expected him to go look at the cases. That was never done. I gave him a list of my cases,my current work, and I did expect him to go look into it.

Q Did you describe the cases?

A I did.

Q Did you discuss any of their special aspects?

A I did.

Q Did you discuss any of their special aspects?

A I did.

Q Did you tell him whether you thought they were complex?

A I did.

Q Did you tell him where you thought they involved national figures?

A I did.

Q And you made all the arguments with regard to whether those cases were or were not of a GS-12 level?

A I related them to the job standard, yes.

Q And you testified that Mr. Friedman also had an interview -- let me withdraw that question.

Is that process we have described, that two-hour interview, what you call an audit; is that what we are talking about?

A It's a desk audit but not an on-site audit. There are two separate phases. It's a desk audit.

Q What is an on-site audit?

A For the auditor actually to see me perform my tasks, which is difficult for an investigator.

Q Ride around in the car with you?

A What you do, your job, correct. I'm going now into tasks that are performed in an office. With criminal investigators it is difficult.

Q But you were describing the cases and jobs you did outside the office?

A That's correct.

Q And you had plenty of time to describe to Mr. Friedman precisely what you were doing when you were investigating out in the field?

A I didn't have plenty of time. I was carrying 45 cases at the time, maybe 35 to 40 cases, but I tried

to show him these are cases that took practically all my time and they were all of a very, very serious, complex nature.

Q All of the cases?

A Just about all of them, yes. Timewise, qualitywise. I was carrying 45 cases, but 60, 70 per cent of your time is usually one case a day or one case a week.

Q You said that Mr. Friedman, after he audited you and Mr. Lazarus, it was your belief or opinion he didn't audit anybody else until November. Is that a fair statement of what your statement was?

A Some time in the fall, yes. It might have been October.

Q In October or November he did audit the other investigators who were appealing?

A A whole team came in.

Q And they audited the investigators, all of them?

A Yes.

Q What is the basis of your knowledge?

A We knew when they were arriving. They would take them into the rooms. I was coordinating.

Q Are you aware of a claim made by the plain-

tiffs in this case that only you and Mr. Lazarus were audited?

A I am not aware.

Q Is that claim correct?

A If you say --

Q Assume that claim was made, is tht claim incorrect?

MR. ROTHSTEIN: I would ask Mr. Adams to define the terms when you speak of audited.

THE COURT: I think the witness should answer the question.

A If you are talking about the audit in this case, this would be a desk audit and an on-site audit, which would mean the auditor would go into every case the man had worked for the year before, read it and ascertain its importance and complexity by actually looking at the case dossier.

Q Rather than having the investigator veil it to him himself?

A You can't do it in two hours. It's impossible. I couldn't explain five of my cases, the complexity, the importance of the case, and where I went. It's impossible.

Q But as far as you know, some time in October,

November, Mr. Friedman and possibly other people from the Civil Service regional office came in and interviewed all of the other investigators in that 1966 appeal?

A Yes, interviewed them.

THE COURT: Interviewed them on the subject of what they were seeking, namely, a grade reclassification, and listen to what they had to say and discuss it with them, isn't that so?

THE WITNESS: Yes, sir, as far as I know.

Q You received a letter, I take it, Mr. Kavazanjian, on February 1st, from the regional office which says your appeal had been denied?

A That is correct.

Q Some time you and other investigators went over to the Civil Service office which was up at the Daily News Building?

A That's right.

Q You testified, I think, that you looked in your file and all you saw was a letter from Mr. Loughran involving your appeal from a general investigator to a criminal investigator?

A That is correct.

Q Did you have occasion at that time to observe in that file a typed document called "Analysis and

Evaluation," which stated:

"Although the liaison work and responsibility for representing the INS in a large geographicaal area adds considerable stature to the position, we believe it is not sufficient to warrant a higher grade."

MR. ROTHSTEIN: Your Honor, before the witness answers I think it is obvious Mr. Adams is reading from a document --

THE COURT: Please. There is one thing I demand in a trial and that is that lawyers will state a legal obligation legally only and not state evidentiary data when a witness is on the stand.

Start again and tell me what it is you want to tell me as a legal objection.

MR. ROTHSTEIN: I think Mr. [illegible] has an obligation to inform the witness of a document he is reading from.

THE COURT: Your objection is overruled.

I never saw that document.

Q I am showing you what has been marked into evidence Defendants' Exhibit E. I am showing you pages 22 through 26, and I am asking you first whether that is your signature or a reproduction of it on page

D26.

A That is correct.

Q Would you look at those four pages, just briefly.

My question is, so you know what I am having you look for, is that a letter that you sent to the Civil Service Commission?

A Yes, it is.

Q And on page 22 didn't you say you found a typed evaluation?

A I think that was the appeal decision that I received.

THE COURT: The question is: did you say on page 22 what the question asked you about, that you have found a typed evaluation?

THE WITNESS: Yes, it says that.

THE COURT: To what were you referring when you said "that"?

THE WITNESS: To the letter of decision that I received.

Q Do you have a copy of your letter of decision with you?

A I do not.

MR. ROTHSTEIN: I would note, your Honor --

THE COURT: Please don't note. Don't interrupt cross examination. A trial is not a seminar.

Q Mr. Kavazanjian, the letters that the people received in February of '71 with respect to the regional office's decision on their appeal, was there a contention made at that time by the investigators that the letters were form letters?

A They were all the same.

Q So a letter to Mr. Lazarus would be the same as a letter you got?

A I didn't see Mr. Lazarus but basically the final decision saying you were not doing 50 per cent of it was the same.

Q Was one of the people you went to in the Civil Service in March of '67 Mr. Burke?

A No, sir.

Q Do you know whether Mr. Burke went over there to look at his appeal file?

A I do not know of my own knowledge. I would assume he did. Almost everybody did.

Q We are talking about Mr. Vincent Burke?

A Yes. I do not know of my own knowledge exactly.

Q Mr. Kavazanjian, you stated that you

have reviewed the notes which have been identified as Exhibit F. Just to make it clear what we are talking about, I am handing you Defendants' Exhibit F. Are those the notes that you said you received in May, 1974?

A That's correct.

Q And you said you compare it to other documents that had been supplied to you that were apparently the notes of Mr. Van Tassel, is that correct?

A That's correct.

Q Are you talking now when you say the notes that are apparently Mr. Van Tassel's -- and I am handing you Defendants' C -- are those the notes that you refer to, apparently done by Mr. Van Tassel?

A Yes.

Q Are you saying the notes apparently done by Mr. Friedman, Exhibit F, and those regarding you, Van Tassel's notes, Exhibit C, discussed the same cases?

A Yes, exactly.

Q Are those the cases that you submitted as the basis for your classification appeal? Those were the cases, when Mr. Friedman interviewed me, I told him about because I was working on them.

Q Those were the ones you felt ought to be

put forward to the Civil Service classification expert to support your contention you should be a GS-12?

A They were all my cases.

Q You carried about 45 cases?

A Between 35 and 45.

Q Isn't it a fact, Mr. Kavazanjian, that you stated to the Civil Service Commission that the complex cases, the difficult cases, the ones that support a GS-12 classification, might have numbered between five and ten?

A That's true, absolutely.

Q So all of your case load was not of a complex, difficult or what we might term the most significant cases?

A Quantitatively, that's true. But those five or ten revolved about 95 per cent of my hours.

Q You had maybe 25 or 30 other cases?

A Sure, run-of-the-mine work, which might develop into complex cases, you never know. But the five or ten complex cases took between 25 and 90 per cent of my time.

Q All of your cases were not complex then?

A No.

Q All of your work was not complex?

A Of course not. Some of it was way below the level.

Q Is it true, Mr. Kavazanjian, that when an investigation is assigned it is hard to tell what level of difficulty it is going to be?

A Some of them, yes.

Q The case might mushroom, isn't that right?

A In five minutes a case becomes a national conspiracy.

Q And it might mushroom in six months?

A That's correct.

Q Isn't it true also that the supervisors try to assign cases according to the level of difficulty?

MR. ROTHSTEIN: Your Honor, I would ask counsel to clarify that in point of time.

THE COURT: If it isn't brought out on direct, you may bring it out on cross.

Go ahead.

Q Isn't it true that during the time of these classification appeals and before that the supervisors were trying to assign cases according to the level of difficulty?

A Some of them. Some cases are not assigned by the supervisor; they arise.

Q They arise on the street?

A From the area of responsibilities.

Q You are driving down in your car and you see a --

A Or the arrest from the Suffolk police might come to me Saturday and Sunday; I had a car.

Q If it was a long case you would go back and make a report about it?

A Of course.

Q Would it then be reassigned?

A It might be, but I have never heard of one taken away from me since I have been in the Immigration Service. When I got the case, it became complex and it was my area of responsibility. I kept the case.

Q Were there any cases assigned to you when you became a GS-12 from other investigators that might have developed on the street, let's say?

A I have never had, since I've been in the Immigration Service, a case assigned to me that was taken away from an investigator because he couldn't handle it. I have cases --

Q I didn't ask you that question. I appreciate the answer. The question I asked you: were cases ever assigned to you that were developed or

originally brought in by another investigator?

A Yes.

Q And you stated that supervisors reviewed cases every month.

A Give or take a margin of error of about two,three months if they could get to them.

Q The policy was to try to review it every month?

A Yes.

Q And an effort was made to try to comply with that policy?

A It was impossible.

Q But an effort was made?

A Yes, an effort was made.

Q When you became a GS-12 level invesigator in 1967, were you then assigned more of the more difficult cases?

A The procedure stated the same as it had been in 1962 through 1967. No different in my operations or my supervisor's operations.

Q Did you get rid of some of the smaller cases?

A No. I still had the same area of responsibility that I have to this day. Of course, now I'm

not involved too much.

Q What are you doing today? Are you still with the investigators?

A Yes, but I lost the eyesight of my left eye. I have a disability.

Q You discussed the organization of the New York district and you mentioned there was a general unit, is that correct?

A That's right.

Q Were cases reassigned in the general unit when they start to show signs of fraud or subversion or involvement of a top priority criminal figure?

A Yes. If it ran into another category, if they developed a criminal or fraudulent aspect, it would go somewhere else.

Q Mr. Kavazanjian, were you audited in 1963 by the Civil Service Commission?

A Yes, I was.

Q Did they at taht time look over the cases you had?

A They did. Well, they interviewed me specifically because I had been a Treasury agent and they came into the New York office to look at the comparisons of the job. I was in the car one day and my

supervisor called me by radio and told me to come in right away because Civil Service wanted to talk to me about my experiences as a Treasury agent and the comparison with Immigration cases.

Q You said you were familiar with the organization setup in other districts in the country?

A That's right.

Q How many officers are there inthe New York district? Where does the New York district have its office?

A 20 West Broadway, New York City.

Q Have you been in the Dallas region?

A Yes, I have.

Q Is there a Dallas district?

A Yes.

Q Is there an El Paso district?

A There is.

Q What area does the El Paso district cover?

A Tremendous area. It's probably the size of New York State.

Q Is there one office in the El Paso district?

A The district office is El Paso, but they have various ports of entry where they have investigators placed. There are bridges in El Paso. There are outlying counties. There's work in all the cities around, vast area.

Q How far is the farthest office port of entry to the district office?

A Could be downriver, maybe a hundred miles, a hundred fifty miles, just going off the top of my head.

Q If the area is as big as New York State it could be 400 miles?

A Big area.

Q Did the people in those offices downriver go back to the district office every day?

A No, they do not, that I know of. They might, but they might not. They might go out into the field for a few days.

Q They don't check in physically at the district office every day?

A Got to call three times a day.

Q The district office?

A Sure.

Q Are they based elsewhere?

A No, not that I know of. I don't know of any resident agents in Texas. I think everybody is assigned to the district office. They might go out on detail or on travel status.

Q I thought you said there were investigators at these various ports of entry, I think you described them, that might be several hundred miles from the district office. I was wondering whether they communicated from the district office every day?

A No, they do not. You see, along the border area you have inspection stations and each inspection station gets investigation work, so an investigator from Dallas might go out and spend two, three days on the road and do whatever work he had and the same thing happens in Florida where they cover the whole State of Florida, from Miami, and they have an office in Jacksonville that carries a little part, but investigators will be in travel status. There are no substations, so to speak, for investigators. There might be one or two investigators that get assiged to ports of entry, but they are just plain investigators and they rotate them and they are not designated or specified as anything different. They are investigators to the Dallas or the El Paso district, and the same thing goes in New York, too. We send men out --

THE COURT: What is the purpose of having the district up in Dallas which is 300 miles away from the Gulf?

THE WITNESS: Dallas is its own district. El Paso is another district. Brownsville is another district. Houston -- we are divided up in Texas.

THE COURT: Is there a subdistrict in Galveston and Houston?

THE WITNESS: Yes, they have officers in charge, but these are inspection stations most of the time. Brownsville had its own district, and they would have investigators. But there is no resident status for Immigration agents. You are assigned to a district and that's it.

Q Mr. Kavazanjian, did there come a time in 1968 when another group of investigators appealed their GS-11 classification, investigators in the New York region?

A Yes, the general investigators.

Q That was the people in the General Investigations Unit?

A That's correct.

Q Did you have occasion at that time to write an official in the Immigration Service and refer to the audits conducted by the Civil Service for that investigation?

A I did.

Q Are you aware that the claim of the plaintiffs in this case is that the Civil Service Commission did not conduct audits in that 1968 appeal?

A I am aware that the Civil Service Commission claimed they did the audits but the audit were done by the Immigration Service. That's two different things.

Q Let me show you what has been marked as Defendants' Exhibit HH. I would like you to read the first sentence to yourself.

A Yes, I read it.

Q Would you look at the second page and is that a letter written by you?

A That's correct.

Q Does that letter by you to Mr. Loughran refer to audits made by the Civil Service Commission Regional office?

A That does.

Q It does?

A It does.

Q You wrote that letter?

A I wrote that letter, but there is information -- well.

MR. ADAMS: May I just take 30 seconds with my

colleaque, your Honor?

(Pause.)

MR. ADAMS: We have no further questions, your Honor, or Mr. Kavazanjian.

THE COURT: Could I just go off the record here for a minute?

(Discussion off the record.

MR. ROTHSTEIN: I have a small amount of redirect.

Mr. Adams' last questions about the '68 appeal were totally beyond the scope of direct because I did not ask Mr. Kavazanjian --

THE COURT: You go ahead. I won't stop you if you want to reopen a subject.

MR. ROTHSTEIN: What I am requesting is, because I had not prepared the witness in this particular area, if I could confer with him for about a minute on this?

THE COURT: Do it during lunchtime.

Go ahead with what you have now and then you will take it up with him.

MR. ROTHSTEIN: Very well, your Honor.

it became too complex for him and given to you?

A Only on some very special occasions having to do with classification appeals.

Q When you say having to do with classification appeals, what do you mean by that?

A Well, the only time I can remember cases really taken away from any GS-11, that he had been assigned to and working on, was if the GS-11 appealed his grade based on that work, and then immediately management would take it away to remove the basis of the appeal. This happened a number of times.

MR. ADAMS: I object to that. I request that the answer be struck. It goes into the motives of someone else.

MR. ROTHSTEIN: I think just the last part is objectionable.

THE COURT: All right. It may stand. It is not proof of the fact. It is just this witness' bird's eye view of the situation.

Q One final question, Mr. Kavazanjian:

Mr. Adams asked you about efforts on the part of supervisors to reassign cases. You agree there were efforts made. Was there anything you wanted to add to that?

MR. ADAMS: I object to that question.

MR. ROTHSTEIN: The witness began to give more information and he was cut off by the questioner.

MR. ADAMS: That was objectionable at the time if he wanted to add something. I don't think I cut him offi. I think that is an objectionable question.

THE COURT: You may answer with an indication of specificity and your knowledge thereof.

A I can remember three distinct situations involving removal of cases and in each instance it was because the specific employee -- and it happened to be Farrell, Mr. D'Amico, Mr. Scalcione-- had appealed their grades and asked for higher grades and this work was removed from them. Those are the only cases I can remember.

MR. ROTHSTEIN: I have no further questions on redirect, but I would like to reserve the right, as I have requested before, to explore the one area beyond the scope of my original direct that Mr. Adams covered.

THE COURT: Any further recross?

MR. ADAMS: No further recross.

THE COURT: All right, you may be excused subject to recall after lunch.

Next witness.

(Witness excused.)

J A C K T. L A Z A R U S , called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: What is your address?

THE WITNESS: 42 Irene Court, Closter, New Jersey.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Lazarus, what is your occupation?

A As of May 30th I retired; formerly criminal investigator, United States Department of Justice, Immigration and Naturalization Service, New York, New York.

Q Mr. Lazarus, will you quickly outline the various positions which you held during your career with the Immigration Service?

A I have only had one position as investigator, general investigator, and changed to criminal investigator May 15, 1951 to May 30, 1975 at Manhattan.

Q Have you held any positions with any union or collective bargaining association?

A I was president of the agents association in Manhattan.

Q Was there a further title to that association?

A It was AF of L-CIO, American Federation of

all right to give a description of what the cases are, but "highest sensitity and highest importance" are unnecessary.

THE COURT: That is this witness' statement. It doesn't make it so. But for convenience we will let him refer to his own work -- everybody thinks his work is the most important, you know. There is nothing new about that.

Q In 1966 who was your supervisor?

A Edward J. Farley.

Q And how long had he been your supervisor?

A Oh, since 1959.

Q Did Mr. Farley ever, to your knowledge, go out to the field to perform investigations or work on cases?

A He never went out into the field to work on any cases, any Immigration cases. He was called into the field on one occasion, though, by the FBI on the Colonel Abel case, the Colonel Abel spy case. The FBI felt that they were on shaky ground as to the warrant which they had obtained and they wanted Mr. Farley to meet them so as to lend credence to their entry, Abel being an alien.

Q Aside from that --

A Never, never.

Q -- one case you mentioned --

A No.

Q -- what was the function of Mr. Farrell as a supervisor of investigators?

MR. ADAMS: Sorry, I didn't hear that question

THE COURT: He wants to know what Mr. Farley's function was.

A Mr. Farley supervised a goodly number of men. He also supervised me for a number of years because I was a supervisor under Mr. Farley, so I was there, and I was able to ascertain whether or not Mr. Farley ever went out into the field, and Mr. Farley never went out into the field to conduct any Immigration business. He went out into the field quite often to conduct innumerable pieces of business, but it had nothing to do with Immigration. It had to do with Mr. Farrell and his personal needs.

THE COURT: And his what?

THE WITNESS: Personal needs.

THE COURT: You mean he was running a private business while he was running a Government business?

THE WITNESS: He wasn't running a private business. He was engaging in personal needs, shopping, exchanging things.

THE COURT: That's not going out into the field. Let's not waste time on that kind of talk.

Go ahead.

Q In 1966 you filed an appeal with the Civil Service Commission and were you interviewed and audited by any Civil Service Commission employee?

A Yes, I was audited. I was interviewed by Mr. Friedman, Samuel Friedman.

Q How much time did Mr. Friedman spend with you?

A He spent a long time with me.

Q How long?

A Hours.

Q Hours. Did he go through all of your files?

A I brought all of my files into the room, the conference room. It was just he and I, and I put them on the desk and he went through every file.

Q Did he make any notes?

A Certainly did. Made copious notes. Made statements and notes.

Q Did he make any statements to you about the level of your work?

A Yes, he certainly did.

Q What did he say to you?

A He said they were all --

MR. ADAMS: I object to this.

THE COURT: I will take it.

A He said they were all Grade 12 work except one case, and I did not see that one case.

Q What percentage of your time were you spending on that one case?

A You mean on the case?

Q The one that was not GS-12; what percentage of your time were you spending on that?

A I wouldn't know now what I was spending on that one case then because I don't even believe I was working on the case at all. The case was assigned to me but that doesn't mean I was working on it.

Q Can you say whether or not you were spending more than 50 per cent of your time on that one case that Mr. Friedman said was not GS-12?

A I don't believe I was spending any time on that case.

Q Did Mr. Friedman make any statements to you at the time of your interview about the percentage of work which would be necessary in order for you to be upgraded to GS-12, that is, the percentage of work at GS-12 that would be necessary?

A No, but Mr. Friedman -- but we conversed on that basis prior to my interview and after the interview about that, because I was president of the union and he

and I discussed that aspect of the audit as well as many other audits.

Q Would you identify the time and place of the conversations and what was said by Mr. Friedman?

A Well, when Mr. Friedman came into the office he came and announced himself to me, and since I was president of the union he saw fit to announce himself to me, and we thereafter had running conversations continuously. He would walk about the office and come over and sit down and talk to me about all aspects of the audit that he found difficult to understand. He was often in a quandary as to many aspects of our work --

THE COURT: Mr. Lazarus, your attention has been focused on the matter of the percentage of work required for GS-12 grade. Will you refer to that and any conversation from that subject until you are asked about something else?

THE WITNESS: I don't understand what you mean, your Honor.

ME. ROTHSTEIN: Perhaps if I rephrase the question.

Q Are you familiar with what is meant by the majority time rule and the substantial time rule?

A Right, and that is what we would discuss, on

and off, continuously.

Q Would you give the nature --

THE COURT: What were the discussions on that subject?

Q What were the discussions?

A Well, at the very outset, the reclassification was going to be done on the substantial basis. Later, in midstream, a totally different yardstick was going to be used. It was changed from substantial to majority and, of course, that aroused our ire. This aroused us, and that was the basis for the discussions, the continuous discussions.

It wasn't a one-discussion and it ended and that was it. It was volatile. It was heated.

When I saw him I saw red, and when he saw me he saw red, and there were statements, there were throw-aways. There was no formal proceeding and formal discussions. I was incensed at his attitude.

Q Mr. Lazarus, let me ask a question. I think you have responded to my last question. I just want to ask you again what exactly did Mr. Friedman say to you in the beginning when you stated a minute ago that it was the substantial time rule that was to be used; what were his words? What was his statement to you?

A What was his statement to me, his exact statement to me?

Q As best you remember.

A In 1966, as to the substantial versus the majority?

Q Yes, that is my question.

A Well, I am certainly not going to characterize what he said to me then now because it wouldn't be accurate.

Q I am not asking you for his exact words.

A I can generalize. I can characterize, but I can't give you verbatim conversations. It would be honest.

Q I am not asking you, Mr. Lazarus, for verbatim conversations. What was the substance of what he said to you in 1966 about which rule was to be applied in classifying the investigators?

A When he came into the office his conversation and introduction to me as to who he was and what he was going to do laid the basis for his subsequent audit. At that time, the ground rules, our understanding, our conversation was that it would be based upon substantial evidence of Grade 12 activity.

Q And did he express a percentage at that time when he said substantial?

A Yes, something as to 15, 25 per cent.

ks10 Lazarus-direct

We were not going to, as I recall, we were not going to break it down into percentiles. In other words, it wasn't going to be 24 per cent versus 25 per cent. It was going to be within reasonable areas of 15 to 25 per cent.

Q Well, Mr. Lazarus, you, of course, received a letter of denial in February of 1967. After you received that, did you attempt to review your appeals file with the Civil Service Commission?

A Yes.

Q Would you describe, sir, how you went about doing that and what happened during the course of such appeals?

A Very simply. We went to the Civil Service Commission, looked into it, and we were directed into where we would be able to sit.

Q Where did you go and who directed you?

A The Daily News Building, and we went to see Mr. Sauerhoff who got the files for us, and we looked at our files.

Q What did Mr. Sauerhoff say about the files he was giving you, if anything?

A "This is your appeals file."

Q Would you tell us what you found in your file, Mr. Lazarus?

ksll Lazarus-direct

A Yes. I found a piece of paper which had nothing to do with the appeal.

Q Were the notes which Mr. Friedman had made ever made available to you?

A Absolutely not. I asked Mr. Sauerhoff for the notes.

Q What did Mr. Sauerhoff say?

A "They're in the file."

I said, "There's no such thing in the file. Here's the file."

And I asked Mr. Friedman for his notes.

Q When did you ask Mr. Friedman for his notes?

A When Mr. Friedman next came back into the building, I said to him, "You told me my entire case load was Grade 12 work except one file. How come I didn't get my Grade 12 promotion?"

Q What did Mr. Friedman respond?

A He walked by, he turned his head, and he walked by, and I hollered after him, I said, "You're going to have to explain that in the Southern District Court some day."

THE COURT: This you told him in 1967?

THE WITNESS: That's exactly what I told him.

THE COURT: And then you waited two years in

promoted.

Q Were you reclassifed in '67?

A Yes.

Q Did you continue working on the same cases and doing the same work?

A Exactly the same cases, same work.

MR. ROTHSTEIN: I have no further questions, your Honor.

THE COURT: Any cross?

MR. ADAMS: Yes, your Honor.

THE COURT: We will take it after lunch, two o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

(2:10 p.m.)

J A C K T. L A Z A R U S resumed.

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Lazarus, you testified you were upgraded to the GS-12 level in 1967, is that correct?

A Reclassified.

Q Was that a result of your appeal that you filed in 1966?

A Correct.

Q Had you filed any of the classification appeal prior to that time?

A No.

Q You testified that you had a rather lengthy audit with Mr. Friedman some time in 1966?

A Yes, I did.

Q You testified you brought all your cases to that audit, is that correct?

A Absolutely.

Q Does that mean you brought the files?

A Physically all the cases were brought into the conference room, put on the desk and made available to him.

Q How many cases was that?

A I don't recall.

Q Would it be about 11?

A I can't say. It's been a long time. I can't say because his notes are incomplete, although I daresay they are very complimentary, but they are terribly incomplete.

Q I would like you to look at page 22 of Exhibit A. It should be marked in ink. I ask you to glance or read through the bottom paragraph, the one entitled No. 1, and see if that refreshes your recollection --

A Shall I read it aloud?

THE COURT: He just wants you to tell him the number of cases.

A I brought all my cases, all my 11 cases, into the room with me.

Q Does that refresh your recollection as to the number of cases?

A It certainly does not. No, it doesn't.

Q Is that a part of a letter or a communication you had with the Civil Service Commission?

A It's on my stationery. I would assume it's my letter.

Q Did you carry a smaller case load than most investigators because your cases tended to be more important?

A Indeed, yes, that was the reason for it.

Q In other words, you had the more important cases and your case load was smaller than the --

A I had the most important cases.

Q At that audit with Mr. Friedman, Mr. Lazarus.

A Can I change an answer to say yes, indeed this was my letter. I was in doubt before but this is, after reading it, my letter.

Q Yes, certainly.

The audit you had with Mr. Friedman, Mr. Lazarus, what went on at that audit?

Let me be more specific. Did Mr. Friedman look at the files?

A It was a constant give and take.

Q And you discussed what the cases entailed?

A He would ask me, "What is this one about?" and I would say, "Read it. Start here where it says 'Predication' on the report."

He didn't know too much about auditing investigators' files. He didn't even know how to get into the damn thing.

Q He didn't know very much about the case files developed by investigators?

A He didn't know anything about investigations. He was never an investigator, nor did he ever audit investigators.

Q Were you ever an auditor?

A I testified previously my entire experience has been that of criminal investigator, ascertaining facts.

Q Would you look at page 38 of that document you have in front of you, Mr. Lazarus.

Is that a description of the GS-12 cases you had during the time you were audited? Not a description but is that the name?

A These are the Cosa Nostra cases I had.

Q The ones with check marks on them?

A Right. Well, I say right. You have a document here with check marks on the side, you have names and file numbers.

Q Is that your handwriting?

A Indeed, that's my handwriting. What is it supposed to represent? What is this piece of paper, what does it represent?

Q I didn't ask you. It has been identified.

A Yes, it has been identified. It's my handwriting.

Q When an investigation first comes into the office, is it difficult to immediately identify what kind of investigation and how difficult it is?

A At that given moment, it is not difficult at all to ascertain what it is. Not what it will become, but what it is. Then and there is what you are asking. It is not difficult at all.

Q You have pointed out how bad that question was that I asked you.

A I didn't mean to. Please excuse me.

Q I appreciate it.

Is it difficult to tell, when an investigation first comes into the office, what kind of investigation it is going to develop into?

A Absolutely impossible.

Q It is impossible to tell?

A Right.

Q You can't really tell before all the facts are in, is that right?

A No, you can tell as it gets off the ground, so to speak, in what direction it is going.

Q But a simple case could mushroom into a

grandiose conspiracy, is that true?

A Overnight.

Q And a case that initially appears to be a broad,multiple-subject case may disappear?

A Rarely does that ever happen. Impossible.

Q Didn't you say once to the Civil Service Commission that "We challenge anyone to pick out a case to decide how it will be resolved or if it is a GS-11 case before the facts are in"?

A Did I ever say that?

Q Would you look at page 79 of Exhibit A. I am really referring to the last sentence at the bottom of the first full paragraph.

A The last paragraph, you say?

Q The bottom of the first full paragraph.

A "We challenge anyone to pick out a case and decide how it will be resolved or if it is a GS-11 or 12 level case before the facts are in."

This is absolutely untrue.

Q Is that a letter written by you?

A Is that part of the same letter?

No, this is another letter.

Q Would you look at the same page, A-79, and identify whether or not that is your signature on the bottom of that letter.

A That is not my signature.

Q It is not your signature?

A No.

Q Does it say Jack T. Lazarus on it?

A It certainly does.

Q Could you identify who signed that letter?

A No. How in the world could I know who signed this letter? There is no initials or anything on it.

THE COURT: You don't think that the Civil Service Commission signed that letter, do you?

THE WITNESS: I'm an investigator, your Honor. I don't --

THE COURT: That is why I am asking you.

THE WITNESS: I don't engage in conjecture.

Q Would you look at page A-77.

A Page what?

Q 77 of that file there. Is that letter on the letterhead of the United States Immigration and Naturalization

Service Employees Lodge No. 1917?

A Exactly. Yes, sir.

Q And you were the president of that lodge?

A Yes, sir.

Q At that time?

A Yes, sir.

Q July 13, 1966.

A I think I was. Don't hold me to the July 13th. I think I was. Right.

Q You are saying that statement is untrue, the one about not being able to tell?

A I have already said what I thought. I said yes, that is not so, and I have also stated that is not my signature.

Q Would you say that Mr. Friedman's audit of you in 1966 was thorough?

A Absolutely thorough and complete.

Q Would you say it was fair?

A After he told me that I was going to be made a Grade 12 and after he reviewed all my cases and then I didn't become a Grade 12, you're asking me if I thought it was fair? I'd be insane. I mean, you don't really mean to ask me that, do you? You know, after he audited me, he ceased all operations for a very good reason. He

didn't know whether he was coming or going. He realized he was in difficulty so he stopped all audits. That's the reason why he stopped.

Q Didn't you call the audit an on-site inspection? "This interview called an on-site inspection is the sole determining factor. This come see for yourself type of appraisal is very fair."

I'm referring to A-23. I'm referring to page 23 in a letter you have identified you wrote.

A You asked me if Mr. Friedman's audit was fair. This is a horse of another color. Don't commingle both of them now. Just read it again.

Q "The on-site inspection done by the United States Civil Service Commission auditor, Mr. Friedman, this interview called an on-site inspection is the sole determining factor. This come see for yourself type of appraisal is very fair."

A This was an academic referral to a means of assessment which I said is a fair appraisal; an on site inspection is indeed the fairest of all inspections. It has nothing to do with Mr. Friedman's evaluation which you and I know was completely tainted, not by Mr. Friedman, but directed by others as to the taint.

Q Who directed the taint?

A You have got to tell me that. I have no marbles. You have got all the marbles. All I know is the defendants in the evaluation received the judgment three weeks ahead of us. The regional office received Mr. Friedman's evaluation three weeks ahead of us and when I made inquiry as to how does the defendants in an action receive the judge's verdict three weeks ahead of the plaintiff, they said, "Well, you know, they have the right to veto our inspection." On the basis of that, you know --

Q Mr. Lazarus, let me interrupt.

A -- the whole thing was a charade.

Q Didn't you --

THE COURT: Did you ever write a letter saying it was a charade?

THE WITNESS: Oh, I did worse than that.

THE COURT: Never mind about the worse part. Did you write a letter saying --

THE WITNESS: Indeed I called every day.

THE COURT: Show me the letter.

THE WITNESS: I called everybody and I wrote letters and very strong letters.

THE COURT: Show me the letter.

THE WITNESS: I maintain no file.

THE COURT: Look here, you are going to keep

decorum in this court. You are not running a stage, nor is this a meeting. I am asking you whether you wrote a letter saying that this was a charade after you discovered what you claim you discovered. I want to find out --

THE WITNESS: I certainly did.

THE COURT: -- whether these after-reflections on your part.

THE WITNESS: Oh, no.

THE COURT: Or whether they had some counterpart in currency.

THE WITNESS: I not only wrote letters but called people every day, every single day.

THE COURT: I am asking for the production of the letter you wrote immediately after you learned --

THE WITNESS: I have no file.

THE COURT: -- that they had gotten a decision three weeks before you. Have you got such a letter?

THE WITNESS: I have no letters, your Honor.

THE COURT: All right.

Go ahead, Mr. Adams.

BY MR. ADAMS:

Q Mr. Lazarus, didn't you say to the Civil Service Commission that "I am aware of things that took place between the Commission and this Service but I will not now

divulge them but save them for use in our proposed litigation"? Didn't you say that?

A I probably did. I can't tell you specifically, as I told you Honor here, I made -- I did a lot of things, wrote a lot of letters, made a lot of calls. I probably said that. That's very indicative of the way I felt.

Q Would you look at page 26 and just confirm whether that is not part of your letter, the top of the page. I believe you indicated by moving your head either assent or non-assent. Could you speak so the record will show? Is that said in your letter?

A Absolutely, right. It's here in the letter.

Q Mr. Lazarus, this morning you said that when you visited the Civil Service Commission, its offices up in the Daily News Building, you took a look at your appeal file and that you found in the appeal file nothing that had anything to do with the appeal, is that correct?

A Nothing at all.

Q Is that correct?

A Absolutely. No, now, wait a moment.

Q I would like you to look at page 21 of that document.

A I was about to revise my answer on that question. I found a piece of paper there that --

Q Does that refresh your recollection as to whether there was anything in your file?

A Yes, that was in my -- that, yes, that was on this little piece of paper. I remember a little piece of paper that had writing on it.

Q Isn't that the thing you describe here, that you were reassured when "I saw Mr. Friedman's report on his on-site audit of mee of August 25th," and then you quote a part of the report?

A No, I did not see his report. There was no report in that file. There was a piece of paper.

Q Page 21 of Exhibit A.

A Well, let me put it this way: I don't recall having seen a report. I recall seeing a paper and I remember this paragraph, analysis and evaluation. I remember this paragraph.

THE COURT: Is there an extra copy of that?

MR. ADAMS: I really don't believe so. I supplied a copy to the plaintiffs and I am using one. I will have a Xerox made for your Honor.

THE WITNESS: I remember the analysis and evaluation part, this paragraph, but I don't remember any report.

THE COURT: Read into the record the words

that appear there that will be the equivalent of my looking at it.

MR. ADAMS: This is from page 21 of Exhibit A, Paragraph 1:

"Reviewed my file, Lazarus, Jack T. and 17 others for 501(B) appeal at the office of the USCSC in Manhattan and was reassured when I saw Mr. Friedman's report on his on-site audit of me on August 25, 1966."

Q Mr. Lazarus, when you got the letter from the regional office in February, I believe, of 1967, which turned down your appeal, you and a few other investigators then took an appeal further to Washington, is that correct?

A We did.

Q And that further appeal, the second step in this classification appeal was successful for you individually, is that correct?

A It was.

Q But there were a number of investigators who were turned down at the regional office level who did not appeal, is that not also correct?

A Yes, but they were reclassified anyhow.

Q Didn't you state at one time to the Civil Service Commission that as far as you knew those people

felt that they did not belong in GS-12 level?

A I can't remember saying that, but I might have. If somebody asked me why doesn't somebody appeal, I might have said, "They probably don't want to. They probably don't feel they deserve it." I could very well have said that.

THE COURT: That is not what the question was. The question was whether you said there was no basis for them to appeal and that is why they didn't appeal.

THE WITNESS: I wouldn't remember if I made such a direct statement. I might have.

THE COURT: Well, if you made it, was it true?

THE WITNESS: I wouldn't know. I wouldn't know now under what circumstances I made it, did I speak with one of them, did they tell me that they felt that way. I mean, I don't recall now the basis for that statement. If it was put in its proper perspective I might know what to say.

Q Mr. Lazarus, some time after, shortly after the second stage of the classification appeal had ended and a number of people who had been rejected the first time around had been upgraded, including yourself and Mr. Kavazanjian, did you work out a system with Mr. Esperdy to have Mr. Esperdy or the district director look at some

of these appeals, some of the work done by these investigators?

A We, in our monthly meeting with the district director, told him that those who were denied and who had not appealed were not necessarily those who weren't worthy, but who were terribly frustrated and did not wish to continue and would he be kind enough as a matter of discretion to look into the worthiness of their cases.

Q And did Mr. Esperdy do that?

A He did.

Q And did he not upgrade some more investigators? Mr. Tarrant?

A I would say, reluctantly I would say yes, but when you mention Tarrant, when you zero in on one man, you know, I haven't seen the man in ten years.

Q I understand that. How about Mr. Burke?

A I can't recall Mr. Burke.

Q You felt Mr. Esperdy would give a fair evaluation of some of these people who felt frustrated by the Civil Service Commission?

A I didn't feel that at all. There was nothing fair about Mr. Esperdy. He was very cognizant of what the political thing to do was and he was interested in maintaining a good spirit in the office, and he was

interested in maintaining a good strong hold on the situation, and he had realized that things were just crumbling, and he was very eager to maintain tight control and --

Q Didn't you say of this action that "We believe that the reexamination of the qualifications of Investigator Tarrant and his ultimate reclassification by INS to GS-12 field grade was a courageous and equitable action by the Service"?

Let me show you what has been marked Defendants' Exhibit W.

A I don't remember much about Tarrant because he subsequently left New York and went to Florida. I haven't seen him so many years.

Q I am showing you Defendants' ExhibitW.

A That's not my signaturee.

Q Do you know whose signature it is?

A I have no idea.

Q Were there a number of people signing your name on behalf of Lodge No. 1917?

A There were people assigned to various committees, chairmen of various committees who had authority to sign my name.

Q Did you authorize that?

A Certainly did.

Q So this letter was sent out with your authorization?

A Yes. However, I have no recollection of that letter. We sent out dozens and dozens of letters.

Q All signed with your name?

A Yes.

Q And with no identification that it wasn't your signature?

A Evidently that was a wrong thing to do. They should have initialed it but, you know, but with authority, of course.

Q Therefore, Lodge 1917 had the authority, somebody had the authority to say on behalf of Lodge 1917 this was a courageous and equitable action?

A I authorized everybody -- anything that was sent out had to be sent out with my name to it; nobody could use their own name because that is the protocol in any organization. You send out -- all mail is sent out over the signature of the president or the authorized official.

MR. ADAMS: May I just take a few seconds, your Honor?

THE COURT: Yes.

(Pause.)

MR. ADAMS: We don't have any more questions.

THE COURT: Any redirect?

MR. ROTHSTEIN: Just one or two questions, your Honor.

REDIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Lazarus, I would like you to look at pates 20 and 21 of Government's Exhibit A, to which Mr. Adams directed your attention, and about which a section or, I should say a section of which was read into the record by Mr. Adams.

I ask you if you ever remember seeing the documents which are pages 20 and 21 before.

A Did I ever see pages 20 --

Q And 21 before, any form at all.

A No.

MR. ADAMS: Was there an answer to that question?

THE COURT: He said "No."

A I do not think I ever saw pages 20 and 21.

Q Do you recognize pages 20 or 21 as being prepared on stationery which had anything to do with you or the union?

A Wait a minute. You got to give me time to think, it's been so long.

I think that page 21 is part of something I wrote.

I don' remember page 20. I don't remember page 20 but I remember page 21. Yes, I definitely remember page 21. As to page 20, I don't recall.

Q Referring to page 21, do you remember the words or do you remember the form of the document?

What I am getting at, Mr. Lazarus, is whether or not this is something you submitted or something which may have been recreated or transposed or transferred from a document you submitted to the document which is in evidence.

A I wouldn't know how to characterize it. I would hasten to say I recall the document, I recall this page, rather, and it's familiar to me.

MR. ROTHSTEIN: Your Honor, at this time I would like to move that Mr. Lazarus' testimony on cross examination with regard to page 21 of the Defendants' Exhibit A be stricken on the grounds of fundamental fairness.

This is a part of the administrative record which was submitted by the government. As I pointed out before,

the record is so jumbled that it is impossible to identify what page 21 refers to and page 22 and page 20 that goes with it. It seems to have no relation to the pages that come before or after it.

Page 20, which is the page preceding page 21, which has Mr. Lazarus' name on top of it in memorandum form, shows two paragraphs on top of the page and then nothing on the bottom. It is then followed by page 21, which the witness recognizes as coming from something he once wrote.

I think if the government is going to use a document written by the witness in order to attempt to impeach his testimony, it is imperative that the document be identifiable as having been written at a certain time.

THE COURT: Is this one of the documents that was admitted in evidence?

MR. ROTHSTEIN: Yes, as part of the administrative record.

THE COURT: When did you look at it?

MR. ROTHSTEIN: I can't recall when I saw it.

THE COURT: You stipulated this should go into evidence. Didn't you look at it before you

sipulated?

MR. ROTHSTEIN: I did, your Honor. I felt all the records should before the court. It's the manner in which it is being used I am objecting to. I think it is highly improper to --

THE COURT: I don't know whether it is your use or reflection and/or Mr. Adams' use or reflection I doubt. May I see a copy?

MR. ADAMS: Your Honor, these documents have been in the hands of plaintiffs' counsel in excess of a year; maybe two or three years. The document by its face is clearly identifiable as Mr. Lazarus' communication and he has identified it as such.

THE COURT: What do the initials ICA and the initials APP refer to?

MR. ADAMS: They generally refer to, your Honor, kind of a reference on the corner --

THE COURT: What do they express?

MR. ADAMS: From the Bureau of Inspections. In other words, a letter from the Civil Service Commission --

THE COURT: I just want to know what ICA spells out.

MR. ADAMS: I don't know what ICA means.

It's a beaurocractic thing that appears in the corner of letters from the Civil Service Commission. I says, "Please refer to," when you respond to something. I would think there would be an example of that letter in the record. I would point to a page 48 of the document you have, up to the right-hand corner.

MR. ROTHSTEIN: I would further note, your Honor, the certification page, which is attached to my copy, says that the documents in this file relate to Edward Kavazanjian, Frank Benemio, Joseph D'Amico, Joseph Farrell, Edward Bertele and Alex Flasterstein. There is no mention to Mr. Lazarus.

MR. ADAMS: That's because Mr. Lazarus was not a named plaintiff in this case, but it refers to the appeal taken by these investigators both at the regional level and the Washington level.

THE COURT: To set you straight, Mr. Rothstein, this document, which is appropriately sealed and has been in your possession in some form or another for a year and was stipulated by you to be evidence in this case, is appropriately before me. I am trying to determine whether some pages are out of order. That's all that seems to be involved here.

MR. ROTHSTEIN: What I objected to, your Honor, is not the document being in evidence but the manner in which counsel used the document.

THE COURT: There is no objection to the manner in which he is using it. He is using it entirely appropriately.

MR. ROTHSTEIN: I would think --

THE COURT: You can draw your inferences from it and he is entitled to draw his inferences from it.

MR. ROTHSTEIN: I think it is fundamentally unfair --

THE COURT: There is nothing unfair about confronting a man with his own documents.

MR. ROTHSTEIN: Except they should be in a recognizable form, not having been shuffled and transposed by the person who is the custodian of the documents.

THE COURT: That's something you should have gone into months ago and not hit upon now while the witness is under cross examination.

It seems to me that ICA followed by the AP probably has something to do with the investigators who were up on appeal. I suppose a little work with

this file would reveal it exactly.

MR. ADAMS: Your Honor, the document I pointed out, page 48 of Exhibit A, is a letter to Mr. Lazarus from the Civil Service Commission in connection with his request for reopening and reconsideration of the classification which was denied by the New York region.

In the upper right-hand corner are the initials ICA:APP. It would be my -- well, my characterization is not relevant.

THE COURT: I will examine the file carefully.

MR. ROTHSTEIN:

Q One further question, Mr. Lazarus.

I direct your attention to page 73 of Defendants' Exhibit A. I show you my facsimile copy and I ask if the signature Jack T. Lazarus, which appears on that page, is in fact your true signature.

A Yes, that is my signature.

MR. ROTHSTEIN: No further questions on redirect, your Honor.

THE COURT: Thank you. You may step down, Mr. Lazarus.

(Witness excused.)

hpa

MR. ROTHSTEIN: I call Mr. Alex Flasterstein.

A L E X A N D E R F L A S T E R S T E I N, a plaintiff herein, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Flasterstein, what is your occupation?

A I am a criminal investigator with the Immigration and Naturalization Service.

Q Will you give us a brief outline of the positions which you have held with the Immigration and Naturalization Service?

A Naturalization examiner, presiding inspector, which is the forerunner of the present immigration judge, displaced persons hearing examiner, and acting trial attorney in immigration and deportation cases, criminal investigator. At the moment I am acting supervisor-investigator in a Grade 13 position.

Q When did you become a GS-11 investigator?

A About 1955.

Q And 1966 what was your grade level?

A 11.

Q Which section of the Immigration Service were

A To supervise. He didn't go out in the field with me and there was a minimum of supervision. They say the strongest back gets the heaviest load. I had the oldest, toughest cases which in uncourth parlance were called the stinkers.

Q Where did your supervisor supervise you in the handling of the cases?

A His main job was to look over reports, and to satisfy himself that he was satisfied.

Q Did he direct you in any detail how to carry through your investigations?

A No.

Q In 1966, of course, you appealed your classification with approximately 52 other investigators in the New York district. I ask you if you were subsequently contacted by any representative of the Civil Service Commission in connection with your appeal.

A No.

Q Were you ever interviewed by anyone?

A Yes.

Q When were you interviewed?

A In late October, 1966.

Q Do you remember when you had filed your appeal?

A No. It was subsequent thereto. I don't remember exactly when.

Q Do you remember about how long was after you had filed your appeal?

A A few months subsequent to late October, 1966.

Q A few months subsequent to the appeal, do you mean?

A Yes.

Q Who interviewed you?

A A Mr. Friedman.

Q Where did this interview take place?

A In a cubicle at 20 West Broadway, New York, New York, 10007.

Q How long did this interview take?

A I estimate five minutes. Not more than 10 minutes.

Q Would you describe to the judge everything that you can remember about that interview which you say lasted for 10 minutes?

A I told Mr. Friedman that I had cases which I thought were GS-12 work, and I wanted to show them to him so that he could evaluate it. And he said that people in the General Investigation Section

spend only about 40 per cent of their time on GS-12 work.

And I said that the arithmetical percentage was a fiction; what was important was the quality of the work, and would he look at my cases and evaluate them, audit them. He refused again.

Q When you say he refused, do you remember what he said?

A Well, I said the cases are in the cabinet, I have about 50 cases, such-and-such a case -- I had Bell & Howell, et cetera, et cetera, I had a secret case where, if he could get a clearance, I want him to look at that I didn't feel privileged to reveal. And he simply said he didn't have to see them. There was no heated discussion. He just wouldn't look at them.

Q How many of the cases you wanted to show him were secret?

A I think there was one secret case that I did want to show him. There may have been others but I don't remember.

Q Do you remember about how many cases in toto you wanted to show him that you felt were Grade 12 level?

A I wanted him to select. I had a list of about 55 cases which I subsequently put in a letter to the Civil Service Commission. I mentioned the names and the numbers. And I expected them to look at a sample, and I was a naive simpleton because I expected a fair audit and I trusted the man and I made an error.

Q Do you remember the words Mr. Friedman used when he declined to look at your cases?

A He just said he wouldn't. It was a short, casual conversation.

Q Did he ask you any questions about the amount of time that you were spending on any of your cases?

A He didn't ask; he told me.

Q What did he tell you?

A Forty per cent. In other words, it was a semantic thing. The word "general" connoted to him -- I don't want to go into the operation of his mind -- he told me general investigators did up to about 40 per cent of G-12 work, if that.

Q Could you characterize, if you would, your impressions of Mr. Friedman's attitude at the time --

A Well, he was a Civil Service auditor.

MR. ADAMS: I object to the question.

THE COURT: Sustained.

Q Your appeal was denied in February, 1967, is that correct?

A Yes.

Q Did you subsequently appeal to the Bureau of Inspections?

A Yes.

Q Subsequent to your appeal to the Bureau of Inspections, were you audited or interviewed by anyone else from the Civil Service Commission?

A Sir, this is my first day in court. I have never had an audit. I had an interview with a Mr. Friedman, which was a casual conversation. To my knowledge, and certainly as far as my eyes and ears are concerned, nobody sat down and looked at a single case and said, "Flasterstein, you are wrong, that's an 11 case." This is my first day in court, and regardless of the court's decision, I thank God for it.

THE COURT: What is the meaning of that last comment? What are you trying to convey to me?

THE WITNESS: The day in court is more important to me, sir, your Honor, than -- I would like

to win this case but the day in court to me, I don't think the Civil Service Commission gave me a day in court, a fair hearing. I think I am getting it here and I appreciate it.

THE COURT: It didn't sound like that when you said it before.

THE WITNESS: Then I was inarticulate and I apologize to the court. I didn't mean to cast -- this is what I meant, sir.

Q You received another letter of denial in June of 1967, is that correct?

A Yes.

Q Did you continue to work on the same cases and kinds of cases?

A Yes.

Q In June of 1968 did you appeal from your position again?

A I don't remember the date, sir. I do know that I kept on appealing. I kept on writing letters, and that was it.

MR. ROTHSTEIN: For the record, the stipulation will show that Mr. Flasterstein was included in the second wave of appeals in 1968.

Q At that time were you still working on the same kinds of cases which you believed to be at the GS-1 level?

A Yes.

Q At that time were you contacted, interviewed or audited by any Civil Service Commission personnel?

A No.

Q Do you know whether any Immigration and Naturalization personnel or classifiers at that time were auditing investigative positions in connection with the

MR. ROTHSTEIN: I have No further questions, your Honor.

CROSS EXAMINATION

BY MR. ADAMS:

Q How long have you been with the Service, Mr. Flasterstein?

A Since March 1941. I did go into the Army for five years less three months in April of 1941, commencing in April 1941.

Q When did you become an investigator?

A About 22 years ago, sir. I think you may have it in the records.

Q I don't.

A Well, it's about 22 years ago, sir.

Q What grade level were you when you first became an investigator?

A I think it was a 9.

Q And what grade level were you in -- when did you say you became a GS-11?

A About 1955. I would have to check the record.

Q Are you sure it wouldn't be 1964?

A It may be.

Q Nine years later; it could have been about '55 or it could have been 1964?

A It may be. I have some records here that I might be able to check, but it may be.

Q And in 1966, as you testified, you appealed to the Civil Service Commission?

A Yes.

Q And you had an interview with Mr. Friedman?

A Yes.

Q And it is your testimony, Mr. Flasterstein, that that interview only lasted ten minutes?

A That is correct, ten minutes or less.

Q What did you talk about in that interview?

A I told him about my cases and I asked him to look at them.

Q Did you tell him about the cases?

A Very briefly. I couldn't tell him much, sir. I only spoke to him -- he didn't give me that much time. I just old him very briefly I have cases that are GS-12 cases, that I think are GS-12 cases; I would like you to look at them and evaluate them.

Q But you didn't make any effort to explain what the cases were about?

A I told him briefly, yes, very, very briefly.

Q Very briefly?

A Yes, yes.

Q And you told him to go look at the files?

A I offered to bring him the files. I did not expect the man to take my word for what the cases were because I obviously was pleading my cause with him.

Q And you say that Mr. Friedman told you that he had 40 per cent GS-12 time, is that right?

A That's right.

Q And that you wouldn't have anything to say about it?

A I told him that I thought it was a fictitious, arbitrary standard; that I did tell him.

Q And you thought you had more?

A I thought I had more, but I did not perceive the fact that the man attached such significance to a mythical percentage. This was my intellectual error, sir.

MR. ADAMS: May we have this marked for identification, four pages, as Defendants' Exhibit LL.

(Defendants' Exhibit LL was marked for identification.)

xx Q Mr. Flasterstein, I am handing you what has been marked LL for identification and just ask whether you can identify that?

A Yes. This is my signature and this is a letter that I sent, a letter which I mention the estimating

of 40 per cent, and a letter in which I said that I thought it was fictitious. I said what should decide is simply the highest quality of the work involved.

MR. ADAMS: We would offer this into evidence. I am showing it to Mr. Rothstein. The document was previously turned over, a copy of that document was previously turned over to plaintiffs' counsel in September of 1973.

MR. ROTHSTEIN: May I have a moment, your Honor?

(Pause.)

THE WITNESS: May I say something off the record, your Honor?

THE COURT: Everything is on the record.

MR. ADAMS: Plaintiffs' counsel has pointed out an error that I have made, that it is already in evidence as Plaintiffs's Exhibit 23, and we would withdraw the offer of this as being a duplication.

THE COURT: Basically you disputed the quantity--

THE WITNESS: Theory.

THE COURT: -- theory of evaluating the work and you thought that you ought to be graded according to the quality of your work, even if it was as little as 15 and 21 and 26 per cent --

THE WITNESS: Yes, sir.

THE COURT: -- of the standard set forth in GS-12.

THE WITNESS: Yes, sir.

May I make a short comment on it?

THE COURT: Well, he is going to ask you questions.

THE WITNESS: Okay.

BY MR. ADAMS:

Q Furthermore, Mr. Flasterstein, didn't you and Mr. Friedman agree that you were doing only 40 per cent of your time; doesn't that letter that was written say "We estimated I spent 40 per cent of my time on GS-12 work"?

A The letter does say that, but what I was trying to do was be as clear and honest as possible in writing to the Civil Service Commission.

What I meant was the conclusion reached according to Mr. Friedman was 40 per cent.

Q Your argument really was that no matter how much time you were working on it, it was really the type of cases that you were working on and the type of work that you were doing on them.

A 112 Watergate is worth 30 11ths, in my opinion

Q Mr. Flasterstein, when you appealed to the regional level, the regional level denied your appeal, is that correct?

A That's correct.

Q And you appealed further to the Washington level, the Civil Service Commission, and they denied your appeal, is that correct?

A That's correct.

Q Did there come a time when you wrote to the Immigration Service and asked for an evaluation by the -- this is subsequent to the denial of your appeal in '67 -- did you write to the Immigration Service and have Mr. Esperdy make an evaluation of your work?

A I assume he did. He never spoke to me and the scuttlebutt was that he considered everybody's case. I don't know what Mr. Esperdy did, and I cannot testify to hearsay. He never spoke to me about it, sir.

Q Did he ever send you a memorandum about it?

A Yes, I remember getting a memorandum to the effect that he thought it was not doing 12 work; yes, he did it to everybody he considered.

Q Is that a copy of the memorandum that was sent to you?

A It's not signed. I don't know. But I am

willing to say that it probably was, and I have to read it. I don't know exactly what is in it. I haven't read it. If you want to give me time, I will read it.

Q Yes, I think you'd better.

A All right.

(Pause.)

May I point out Mr. Esperdy is not Mr. Friedman.

Q Is that a copy of the memorandum Mr. Esperdy sent to you?

A To the best of my recollection it probably is. Probably is.

Q And this was in response to -- Exhibit AA was in response to a request that you had made possibly with other investigators to have Immigration Service people --

A It may well be. I don't know whether we signed a request or whether he did it on his own.

Q This is after your classification appeal in '66 or '67?

A Will you tell me the date? I didn't notice.

Q The date of the memorandum is November 8th, 1967.

A Yes.

Q And subsequent to that time did you go back to the Civil Service Commission and appeal your classification

as a GS-11 investigator again?

A To the best of my recollection we went up to Washington -- I don't think so, ynless your records show to the contrary. I haven't kept a file on it. I don't think so.

Q If I told you that the records did show that you classified --

A I would take your word for it, Counsel. If you say I did, then I did.

Q Would that refresh your recollection?

A I'll take your word for it, Counsel, and say that I did.

Q Mr. Flasterstein, in order to just get something straight, I would like you to look at that document which is Exhibit B and look at page 90 and the pages following thereafter through 96.

A Yes.

Q Is that a letter that you sent to the Civil Serice Commission?

A Yes.

Q Does that describe the cases you had at the time that the letter was sent?

A Yes.

Q Was that part of the classficiation appeal?

A I believe so, sir.

Q After that, were you audited by somebody from the Civil Service Commission?

A No.

Q You recall that?

A Yes.

Q But you don't recall taking the appeal?

A The appeal is a matter of record. If I took the appeal it's your records, it's in the Civil Service Commission records, and if I took the appeal, so be it. I had no reason to keep a comprehensive day-by-day diary. I was not claiming tax deductions.

MR. ADAMS: We have no further questions.

THE COURT: Anything else?

MR. ROTHSTEIN: No redirect , your Honor.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. ROTHSTEIN: Your Honor, I have three witnesses in the courtroom, Mr. Benemio, Mr. D'Amico and Mr. DeVito. I was wondering how late your Honor was going to sit tonight.

THE COURT: I can catch a later plane.

hear him.

MR. ROTHSTEIN: All right.

I call Mr. Frank E. Benemio to the stand.

- -

F R A N K E. B E N E M I O, called as a witness by the plaintiffs, having been first duly sworn by the Court, testified as follows:

THE COURT: What is your address?

THE WITNESS: 70-15 Harrow Street, Forest Hills, New York.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Benemio, would you very briefly outline the positions which you have held with the Immigration and Naturalization Service?

A At the present time?

Q Up to the present time, beginning whenever you started.

A Well, I was an investigator. The title was investigator, general investigator, and the last few years have been changed to criminal investigator.

My work has involved investigations of the criminal and moral narcotic type, high echelon, including the underworld, crime, Mafia, et cetera. I have also

done anti-subversive investigations of very sensitive type. That's it.

Q Were you doing such investigations in 1966?

A In 1966 I was handling fairly complex, in fact, quite complex cases of the syndicate, the Mafia syndicate.

Q Did you believe at that time that you were performing such cases for a majority of your time or more?

A I honestly thought I did. I worked complexities involving Interpol, involving other high echelon Government departments and agencies, also with police work in other cities and so forth, and I think it was highly complex, and also I did over 55 or 58 per cent of my time, at least, in this type of work.

THE COURT: Could there be a difference of opinion about percentage, Mr. Benemio?

THE WITNESS: I hate the word "percentage" because it makes me a computer. For that reason I am in agreement with you, your Honor, but for that same reason --

THE COURT: Well, could an honest man acting fairly on the opposite of the fence, without having any self interest at stake, and not having any intention to do you any harm, come to a conclusion that perhaps you did not do a majority of your work in Grade 12?

THE WITNESS: Well, I would also question him

how he did it. Does he have a --

THE COURT: That gets into a different subject as to his competence. But I am talking about a man having a different point of view. Isn't it a question really of opinion as to whether or not --

THE WITNESS: It is an opinion, right, your Honor. Right. Right, I agree with you, it is an opinion.

THE COURT: Somebody can say it is 57 per cent as you have said and somebody could say it is 43 per cent.

THE WITNESS: We are human beings, as such, and as I said before, we cannot be an IBM computer to say definitely it is 50.4 per cent. That's it. I agree with you, your Honor.

Go ahead.

BY MR. ROTHSTEIN:

Q Mr. Benemio, in 1966 you filed a classification appeal. That, of course, is a matter of record. Were you subsequently interviewed by a representative of the Civil Service Commission?

A Yes, I was. I was given what they call a desk audit by a gentleman by the name of Mr. Friedman.

Q And when did this take place?

A I believe it was some time in the fall or October, thereabouts, of 1966.

Q How long did this interview last?

A Well, he came over to me and I had already prepared -- well, just to answer your question, of course, it lasted about 10 to 15 minutes, thereabouts, approximately.

You want me to describe or --

Q I would like you to describe exactly what transpired during this interview?

A Yes. I had already had a list of Grade 12 work which I was doing, files, and so forth, and I brought a handful, a stack of iles, and this was done not in a closed room, but in the open investigation floor at a desk. I don't remember if it were mine or not.

And I said, "Mr. Friedman, this is an example."

I opened up the file and I told him, I have done this, this, this, this, this is involved, so forth and so on.

When I was talking, I looked at the man. I don't think he understood, in plain English, what I was talking about.

I began to feel that the man doesn't know much about investigation techniques or whatever is involved in that, but I spoke again, and all that, and then said, "Mr. Friedman," at the end of 10, 12 minutes, "you want to

see another file, and I will give you that, or do you wish another file from me?"

He said, "No, that's enough. That's enough."

And that's it. And that was the end of the interview.

Q Did he ask you any questions regarding the amount of time you were spending on various cases?

A Yes. I answered that, oh, there was a majority of time -- I don't know if I said 58 or 60.

Q Did he ask you questions about particular cases and how much time you were spending on those cases?

A No, he did not ask me those questions. He did not ask the questions how many files do you have on that or anything like that.

He seemed to have been -- I don't know -- satisfied with what he saw or dissatisfied. He didn't tell me that.

Q When you showed him things in the file, did he read them?

A He looked at them and somehow he didn't seem to interpret them. He didn't seem to read them in the sense of understanding, and I indicated to him, and that's it.

Q Did Mr. Friedman take any notes while this was

going on?

A I barely saw him writint. If he did write anything, I barely saw -- he might have, but I never saw it.

Q Subsequently you received a letter of denial in February '67, is that correct?

A Right.

Q Did you attempt to review your file at the Civil Service Commission at any time following the denial of your appeal?

A Yes, I did. I went over to, I believe the Court knows it already, I went over to the New York Daily News Building where the Civil Service Commission was located. Mr. Sauerhoff -- I believe that's his name; I'm not too sure -- asked me if I wanted to look at my file.

I said yes, I wanted to see what Mr. Friedman had written. I was under the impression that it was a fairly thick file with some notes and so forth.

They gave it to me. I opened it up and there was a small sheet of paper 3 by 5 or thereabouts and some illegible writings, almost illegible, about three or four words, and then at the end a little less than 50 per cent, and that was all that was written. There was nothing else.

I asked Mr. Sauerhoff, "Is there any other papers or anything else?"

He said, "That's all."

I said, "Thank you" and I left.

Q Did you appeal to the Bureau of Inspections in March of 1967?

A I believe I did.

Q And that, of course, was denied?

A Right.

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Q How were you ultimately promoted to GS-12?

A I was promoted in September, I believe, 1970, because of high rating and the usual techniques of promotion.

Q Until that time did you continue working on the same kind of cases which you described before?

A Until 1970, right. Since then I have been working on these more -- well, not more but different kind of investigations.

Q One further question, if you would describe the role of your supervisor with respect to investigations.

A My supervisor then was a gentleman who supervised, generally speaking, in the sense that he looked over your reports and check it to see if everything was covered, and that's all, and he signed it.

As far as I know, the gentleman never went out into the field, although facetiously somebody said maybe for shipping services, but he never went out into the field to investigate, and he stayed mostly in the office. That's all.

MR. ROTHSTEIN: No further questions on direct, your Honor.

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CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Benemio, how long have you been with the Immigration Service?

A Since 1951.

Q When did you become a GS-11 investigator?

A GS-11, 1964.

Q 1964?

A Right.

Q Prior to your appeal in 1966 to the regional office, had you appealed your classification to the Civil Service Commission before that?

A No. 1966 is the only appeal.

Q Mr. Benemio, in addition to being somewhat a judgment question as to the percentage time, is it possible for an unbiased person with no ax to grind against you or the Immigration Service to have a difference of opinion from another equally unbiased person as to what case meets the GS-12 criteria and what case doesn't?

A Is it possible, you say?

Q Yes.

A Well, anything is possible. Is that what you want me to -- I don't quite understand the pur-

hpa3 Benemio-cross

port of your question. Is it possible for a person who doesn't have an ax to grind to make an honest opinion that I may be working Grade 12 or Grade 11?

Q Is it possible for a person, for two people to disagree whether a case meets the GS-12 criteria?

THE COURT: In short words, can there be a reasonable difference of opinion?

THE WITNESS: There can be a reasonable diffence of opinion, yes. I like that better.

MR. ADAMS: No further questions.

(Witness excused.)

MR. ROTHSTEIN: Mr. Joseph D'Amico.

THE COURT: Your work is classified as falling in quantity below a majority of GS-12, right? Isn't that right?

MR. D'AMICO: In quantity, sir? I'm sorry. I don't follow.

THE COURT: First we will swear you in.

J O S E P H J. D ' A M I C O, a plaintiff herein, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. D'Amico, would you briefly describe the

hpa4 D'Amico-direct

positions you have held with the Immigration Service up to the present date?

A I entered the service in May of 1951 as an investigator. That's a 7. I was promoted in '52 to a 9, as an investigator also.

In 1961, I don't know if it was March or June, I was promoted to an 11, again as an investigator.

In '66 I was transferred to the Fraud Squad, and in 1970, August, I was promoted to a Grade 12, and in December of '71 I was transferred over as a supervisory investigator.

Q In 1966 in what section of the investigations unit were you assigned?

A From June on it was frauds.

Q What was the nature of the cases you were working on?

A At the time we were working -- I was, anyway -- generally and mostly on marriage frauds. It was frauds between Greek aliens and woman of United States citizenship, Puerto Ricans, so forth and so on.

Q At the time you served as investigator would you briefly outline the role and function of your supervisor?

A Up to 1966, when I was in the Smuggling Squad our supervisor was generally an office man whose main function was the file work and administrative procedure.

Again, this type of work, as I am doing now, is different, that the supervisor would get out occasionally on a ship search if there was a stowaway, if stowaways would come in there. But it would be rare.

In frauds, there was no need for the supervisor to go out because these occasions never happened.

Q In 1966 you believe you were doing the majority of Grade level 12 work and filed a classification appeal?

A Yes, sir.

Q Were you subsequently interviewed by a representative of the Civil Service Commission?

A Yes.

Q Do you remember when this interview took place?

A Exactly when I couldn't tell you but it was late 1966, in the fall some time.

Q Do you remember about how long after the

appeal was filed that that interview took place?

A Several months, I think.

Q How long did the interview take?

A Twenty, twenty-five minutes.

Q Would you describe the interview?

A Mr. Friedman -- I don't remember how it happened, he called me or came -- we met in one of the rooms on the 13th floor. I brought in the cases I thought he would be interested in looking at along with a brief outline to myself of what cases or what the nature was. We discussed it for about 25 minutes or so, 20 minutes. I tried to show him the files. He wasn't interested in the files. And again, as someone else said, by the questions he was asking me it was obvious he didn't know what I was saying in regard to the work itself. The nature of the questions regarding my work were not --

Q What did he say when you asked him to look at the actual files?

A He wouldn't look at them, because he didn't have time to go through everybody's files.

Q What kinds of things were in the files that you wanted to bring to his attention?

A Reports in the files, statements regarding

conspiracies between the aliens, the attorney and the citizen spouse, which would be evidence possibly of an extension, a fraudulent extension, of a temporary time. There would be a lot of things that were being used in connection with the marriage fraud schemes at the time.

Q As we know, your appeal was denied in February of '67.

Did you subsequently seek to review your appeals file in the offices of the Civil Service Commission?

A I did go down, yes.

Q Will you explain what happened, what was said and what you were shown? I went down -- it was after some of the others had gone down and I learned I could go down and see it and made the trip. I don't know who I spoke to but my file was shown to me.

The file was different from the files we know them as a back or front. It was clipped on a piece of cardboard.

Now, during Friedman's interview of me I noticed he took some notes and what shook me was that I didn't see any of these notes on the paper. There was nothing there. There was just one paragraph.

Q Do you remember what the one paragraph said?

A It said something like, to the effect that although I was doing work, he didn't consider it was substantial; at the tiem he recommended that I be made a criminal investigator at my same level. Now, this was unsual.

Q Then you appealed to the Bureau of Inspections and received a denial in '67?

A Yes.

Q Were you audited again?

A No.

Q You were not interviewed again?

A I was not interviewed by anyone.

Q In October 1967 were you assigned a case which I will refer to, and I am sure you will know what I am talking about, and the file will reflect a case involving an attorney by the name of "S"?

A Yes.

Q Will you described what was involved, what you did with it and what was developed?

A Well, this case was assigned to me primarily on the predication that this attorney had been trying to hire some civilian personnel on a military base over-

seas and the people at the military base were concerned about his activities. And being these prospective alien immigrants were involved, it was funneled down to the Immigration Service, and since he was a New York man, to us.

The file started on this predication. That didn't go anywhere. It didn't amount to anything because there was no truth to it. But what happened was, what the Labor Department -- we had constant contact with them and I don't remember whether I asked or they asked but it came to light that this attorney was submitting an unusually large amount of request for labor or certifications. This is where the prospective alien must have a job guarantee of a certain quality and so forth. And they were all for live-in maids.

Q How many cases developed from this one case?

A About 60 cases, I think.

Q Did you continue to work on this case as it developed?

A Yes, I did.

Q In May of 1968 did you file a new classification appeal?

A Yes.

Q Was this case one of the cases which you believed were at the GS-12 level and which caused you to file this appeal?

A Positively.

Q What percentage of your time were you spending on this case?

A Better than 70 per cent of my time.

Q How long had you been spending 70 per cent of your time on this case?

A From the October, '67 date to May, up to that point.

Q Did you make this case one of the bases of your appeal?

A I didn't hear you. I'm sorry.

Q Did you make this case one of the bases for your appeal?

A Yes.

Q You appealed in May, '68. What happened with regard to that case after you filed your appeal?

A Let me go back a month before that.

On these cases that are submitted to the New York office by our central office in Washington a reply is always expected. Now, when a reply is expected to be sent to the central office, a call-up

system is maintained where they put down a reply is expected and so forth, a call-up date. My call-up date came up and my supervisor said, "We need a report on this 'S' case."

Q Did you write such a report?

A Yes.

Q How long was it?

A Approximately 25 pages.

Q Approximately how many separate individuals were mentioned in that report?

A Approximately 60, plus the attorney, his wife, a contact, his partner. About 65 people in all were mentioned.

Q Was there a common scheme of conduct that you were analyzing in that report?

A Yes.

Q What happened after you filed your appeal in May of 1968 with regard to the case of Mr. "S" and the related 59 cases?

A I submitted the report and the file with the proper copies and the distribution outline to my supervisor. This was approximately April 25th of '68. I didn't hear anything until something like May 12th, May 16th, when I was told that my report in

the matter was not going to be used, that all copies were to be destroyed except the original copy, which was shown to me later, and a line was drawn through it and the file would be reassigned to A GS-12 at that point who would have to write a report.

Q Was this after you filed your classification report?

A Yes.

Q Was anything said to you by your supervisor about why the case was being taken over?

A Because it was a GS-12 and they have to give it to a GS-12.

Q And this was after the appeal was filed?

A Yes.

May I say something? In January of that year I had written a memo for the file, and I had shown it to my first-line and second-line supervisor, advising him then of the direction and the character in which this case was going, because I could see it was obvious this thing was getting big.

Q What sort of information went into this earlier report?

A This was just a plain memorandum or file advising him that the "S" case has apparently taken

a turn which would make it more important than anyone thought at the beginning.

Q When did you file this memorandu?

A In January of '68.

Q And did it cross the desk of your supervisor?

A First and second line, yes.

Q Would you name them?

A The first line was Steve Greenman, who has since died, and Louis Kaye, who has retired since.

Q In connection with the appeal which you filed in '68, were you ever audited by any representative of the Civil Service Commission?

A I never spoke to anyone about that.

Q During the course of the appeal did you have opportunity to have a conversation with a Mr. Sa-uerhoff regarding the removal of this Mr. "S" case from your work load?

A This was after the denial.

Q Will you explain the circumstances under which this conversation took place by you and Mr. Sauerhoff?

A After the denial had been made on my appeal I went down to the Civil Service and requested to see

my file and at this time Mr. Sauerhoff called me in and he showed me the file. There were certain paragraphs in my denial that annoyed me and I didn't know where he got the wording from.

Q What did Mr. Sauerhoff say?

A He said the Service had GS-12 investigators and were at liberty to take the case away from me.

Q Did you protest this removal?

A Yes. I told him when I first appealed in May of '68 I said in my letter the Service would do this. In fact, as soon as they learned, they did it.

Q As soon as they learned that you would appeal?

A Yes, they took it away from me.

Q Will you repeat again the result of the classification appeal?

A It was denied.

MR. ROTHSTEIN: No further questions on direct, your Honor.

THE COURT: Any cross?

MR. ADAMS: Yes, your Honor.

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. D'Amico you filed your classification

appeal in 1966 with 54 investigators on the basis that you were performing a type of work that should be classified as GS-12, is that correct?

A That's correct.

Q Had you filed an appeal prior to that time?

A Prior to '66?

Q Yes.

A No, never.

Q And that appeal was denied at both the regional office level and the Washington level?

A Yes.

Q Two separate letters, is that correct?

A Yes.

Q And then some time in 1968 you filed another classification appeal asking to be upgraded from GS-11 to GS-12, is that correct?

A That's right.

Q Have you been doing the same work all along?

A By the "same work," I've been in the same section all along, in the Fraud Section, but of course the work moves.

Q You just went into the Fraud Section just about the time you appealed, is that right?

A In '66, in June of '66.

Q And you appealed about June or July of '66?

A I don't remember the date. About that time, yes.

Q But you went into the Fraud Section in June of 1966?

A That's right.

Q And you were doing, in your view, GS-12 work for the majority of time?

A Yes.

Q Did you continue to do that right on until you filed your next appeal?

A That's right.

Q Did you ever have occasion to tell the Civil Service Commission, "I have been performing assignments of a higher category since October, 1967"?

Let me show you a letter that you wrote, Mr. D'Amico, and ask you what you meant by that. This is page 20 of Exhibit D. Is that a letter dated May 16th?

A Yes.

Q Don't you say there that you only started your higher grade work in October, '67?

A I wasn't referring to that because at this time I was specifically talking about something I now

had hard and fast proof and I was talking about this attorney case, the "S" case, because that was assigned in October.

Q The cases you had when you had appealed in 1966 were really part of a larger -- you said you had done some marriage fraud cases?

A Yes.

Q Weren't they really a part of a larger case that was being investigated by another investigator?

A They came out of a large case in that the attorney started naming names of aliens he had used, and files were pulled. These cases were raw. When you went into these cases, 20, 30 -- I don't remember how many I had -- they had the aliens and the citizen, and now you ran into your person who steered them, who arranged it, who took A to B and B to C, who paid. It wasn't merely just that they came out there cold and you had to check yes or no and check six boxes and that was it.

Q This "S" case, Mr. D'Amico, you said you were assigned it in October, '67, it had come from the central office and hadn't developed to anything at the outset; and some time later, after a while, the Department of Labor provided you with information that

made the case somewhat more complex, is that right?

A We had constant contact with the Department of Labor. So much information came through it. The department told us that this particular attorney had been submitting an unusually large amount of these labor certifications period.

Q That information came over from the Department of Labor and all of a sudden the case began to look a little different from what it originally had been, is that right?

A That's right.

Q I think you stated that the central office had an outstanding system with regard to call-ups?

A I didn't say that. I said the New York office, as any office, and I'm sure your office does, maintains a call-up on correspondence which must be answered. Somewhere along the line someone will tell you this has to be done by a certain date, whether it's a case or anything else or you are painting your wife's bedroom. It's the same thing.

Q And that resulted in your writing a rather lengthy report on this now complex case, is that right?

A Yes.

Q After you got that call-up and you started

writing that report then you filed your classification appeal, is that right?

A That's right.

Q And you knew that report was going to be sent up to one of the higher levels, is that right?

A It had to be.

Q And you were worried the case was going to be taken away from you, is that right?

A I had no idea. I said it when I appealed, but at this point I think it was the furthest thing in my mind losing this case. I had told them about this and they were well aware, if they would stop to listen to me.

Q But you also knew that there were instructions,outstanding instructions, that cases of a more complex GS-12 level were to be assigned to GS-12 investigators?

A No, sir.

Q Do you have an investigator's handbook?

A Yes.

Q Did you have one then?

A Yes.

Q Do you know what a G-600 card is?

A I know.

Q And a docket card?

A G-600 is the original assignment card.

Q Am I not correct that some time in 1967 instructions went into the investigator's handbook that cases that were becoming complex were supposed to be -- and possibly reching a higher level -- were supposed to be so indicated?

A By whom to whom?

Q In the investigator's handbook.

A Who would indicate to whom?

Q Either the supervisor or the investigator.

A I did. In January I told these people the case was becoming more complex.

Q How often were those cards sent up to a higher level?

A They are not sent anywhere. They are kept with the first-line supervisor. I have copies of those cards if anyone would like to see them. Those original cards I have a copy of here.

Q Do you know to whom the "S" case was assigned when it was taken away from you?

A I certainly do.

Q Who was it?

A An investigator named Frank Stowe.

Q What level investiator was he?

A He was a 12.

Q How long did that case last after it got taken away from you?

A I have no idea. I couldn't tell you how long it lasted or how long? Because by this point now it was completely taken from me and I had no control over this thing any more.

Q But the case took a definite turn toward the more complex, some time around January, is that correct?

A I would say so, yes. When I submitted that memorandum, I realized then that this thing was a lot more than just the original predication.

Q When you wrote the memorandum on the call-up?

A No, when I wrote the original memo in January.

Q In January was the first time you began to see this case was mushrooming?

A In and around January, yes.

Q Your supervisor, Mr. Greenman, who is now deceased, and your second-line supervisor was Mr. Kaye, and the third line was Mr. Spivak?

A That's right.

Q Did any of those supervisors communicate to you that the Immigration Service was attempting to assign GS-12-type cases to GS-11s?

A No.

Q That was never communicated to you?

A No. I'm a supervisor now. I don't tell the men under me that I'm trying to assign you the easy ones and this one hard ones because he is the dummy and he is not. This is my responsibility as management to figure out which is good and which is bad.

Q Do you assign the most difficult cases in your district, in your section, to GS-7 investigators?

A No, I don't dare do that, if I could see them.

Q In other words --

A If I could see when I am assigning it, I could very well give a 7 a case that could mushroom into a 12, but it is also my responsibility to stay with it.

Q And if it mushroomed into a 12 --

A You should worry about it now that this man is not technically able to do it.

Q And it should be reassigned. That's what

you would do now?

A Long before it got to that point, because I should have regular call-ups on this thing.

MR. ADAMS: I have no further questions, your Honor.

MR. ROTHSTEIN: No redirect, your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. ROTHSTEIN: I have one more witness, your Honor. I call Mr. Anthony DeVito.

A N T H O N Y D e V I T O, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. DeVito, will you state briefly your occupation and the positions which you have held with the Immigration Service?

A I'm a retired former criminal investigator for Immigration, retired two years ago.

Q What positions have you held with the Immigration Service?

A I joined Immigration in 1941 as an investigator and when I retired I was a federal criminal

investigator.

Q What section of the investigations unit were you in in New York in 1966?

A Special Investigation, Subversive Unit.

Q What kind of cases were assigned to you as an investigator in that Subversive Unit?

A The cases assigned to the Subversive Unit were those dealing with subversives. Incidentally, I was part of the Latin-American Section as opposed to the European Section.

Q Within the Subversive Unit?

A Right.

Q What kind of cases --

A These were cases of people who came to the United States for devious means. They didn't come here as a visitor, as they often posed, but they came here specifically to accomplish a mission, a mission against the interests of the United States, of course, and they were worked in conjunction with the FBI, CIA and State Department. It was an interagency cooperative effort.

Q Wh were the supervisors in the Subversive Section?

A My supervisor at the time, I take it the

time you are interested in, was Max Weinman, and then John Graziano in the European Section.

Q What time period was that?

A At the time of the reclassification.

Q What were the roles of those supervisors both in 1966 at the time of the appeals and in the five years preceding with respect to the handling of investigation?

A Max Weinman was out of Latin America. John Graziano was head of the European branch.

Q What was their role? What did they do in respect to cases and investigation?

A They assigned cases, of course, and they reviewed and they directed when there was any direction to be done.

Q During the period I mentioned from 1963 to 1966 did these supervisors ever go out in the field to handle or undertake investigation?

A Never. In my 20 years I never saw a supervisor accompany one of these men out in the field, never.

Q How many years were you in the Subversive Section?

A Since the Cuban breakout, 1961, up until the time I retired, except for the last year, when I

was assigned to another case.

Q Were you working on cases of the same kind and the same level, in your opinion, in all the years you were in the Subversive Section as an 11?

A They were the most difficult cases to be sure, in my opinion.

Q Are you familiar or were you familiar with the cases that were assigned to your fellow investigators in the Subversive Section?

A They were equally difficult, on a par with the ones I had. No question about it.

Q Do you know how they were assigned by supervisors?

A Right off the top. There was just no provision made for giving this one to him because of favoritism or because he specializes in a certain category. Iy came right off the top and that's the way the cases were assigned to the best of my knowledge.

Q In 1966 you filed a classification appeal?

A Yes. Everybody did.

Q Everybody in the section filed an appeal?

A Yes.

Q Were you interviewed by any representative of the commission?

A Yes, Mr. Friedman.

Q How long did he speak with you?

A I estimate the time I conversed with Mr. Friedman to be approximately 45 minutes to an hour.

Q And the result on your appeal was that you were promoted to GS-12?

A Yes, I was successful.

Q How many people were there in the subversive section who appealed?

A Who filed.

Q Who filed appeals.

A I take it at that time we numbered about 15 of us in Latin America filed.

Q Do you know how many were promoted on the basis of Mr. Friedman's audits?

A In that section?

Q Yes.

A I was the only one, wasn't I? I think so. I think I was the only one in Latin America.

Q In Latin America?

A Yes.

Q Do you know any of the men in your squad who were not promoted?

A The remainder, that is to say, roughly the remaining 14.

Q In your opinion were your cases any more complex or more difficult or more of the GS-12 level than those of the men who were not promoted?

A Those persons who were rejected were working the same cases as I was. There was no distinction made. They were all difficult. They were deep. They were likewise working with the CIA, the FBI and the Security Department. There was no difference. The mere fact that I got it and they didn't really surprised me, really surprised me, and there was no accounting really to show why one group didn't get it and I did, no accounting, no logical accounting, anyway. Either we should have all been rejected or we should have all been accepted.

MR. ROTHSTEIN: I have no further questions of the witness.

THE COURT: You didn't offer to give up your acceptance, did you?

THE WITNESS: Whether I should give it up, my upgrading?

THE COURT: You can pass that. You set a standard here in your last comment, and I was wondering just how far you wanted to carry that.

Go ahead, any cross?

THE WITNESS: Judge, I retired prematurely because I felt --

THE COURT: What I asked you about, you said that you should have gone lock step, linked together upward

THE COURT: If they made an error, they misconducted themselves, because they are not supposed to make errors where human beings are involved.

Go ahead with your cross.

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. DeVito, prior to the appeal you filed in 1966, which resulted in your upgrading to GS-12 by the Regional Office, had you filed a classification appeal before that time?

A No, I didn't. I don't believe so. There was one.

MR. ADAMS: We have no further questions.

THE COURT: Any redirect?

MR. ROTHSTEIN: No redirect. I am sure the witness intended no disrespect to the Court in his responses. It is late in the day and he has been waiting here since about 9 o'clock this morning.

THE WITNESS: There was no disrespect, no, Judge. Don't get me wrong. I don't mean to disrespect you, but I fought Rommel; I fought for this country and I worked for this Government and I feel proud of it. I don't want to disrespect you.

MR. ADAMS: Could we get a stipulation from the plaintiffs as to what Mr. D'Amico's present grade level was, what it is.

MR. ROTHSTEIN: He is retired.

MR. ADAMS: Mr. D'Amico.

MR. ROTHSTEIN: Mr. D'Amico?

THE WITNESS: Am I dismissed.

THE COURT: Excused.

THE WITNESS: All right. Thanks.

(Witness excused.)

MR. ROTHSTEIN: We would stipulate that Mr. D'Amico is currently a GS-12.

MR. ADAMS: You stipulate that fact on the record? Fine. It was an error I made and I did not bring that out.

THE COURT: That's right, you did not. There was no mention of his present grade.

MR. ROTHSTEIN: Your Honor, that concludes the witnesses that I have in court today. I have four or five additional witnesses who I would like to call at the resumed court session on Monday.

THE COURT: All right. Off the record.

(Discussion off the record.)

(Adjourned to Monday, June 23, 1975, at 10:00 o'clock a.m.)

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EDWARD KAVAZANJIAN, et al.

vs.

U. S. IMMIGRATION AND NATURALIZATION SERVICE, et al.

New York, June 23, 1975,

10:00 a.m.

Trial resumed.

- -

THE COURT: Are you ready to go further with further proof?

MR. ROTHSTEIN: Yes. For the first witness this morning the plaintiffs call Mr. Arthur Opolion.

A R T H U R O P O L I O N, a plaintiff herein, called as a witness, being first duly sworn, testified as follows:

THE CLERK: Your address, sir?

THE WITNESS: 569 Fowler Street, North Bellmore, New York.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Opolion, what is your occupation?

A I am a supervisory criminal investigator

for the U. S. Immigration Service.

Q Where are you assigned?

A I am assigned to the New York office at 20 West Broadway.

Q Mr. Opolion, would you briefly describe the various positions which you have held within the Immigration and Naturalization Service and the grade levels at which you have been classified?

A I entered the services November 19, 1962 at New York as a GS-7 criminal investigator. A year later, November of 1963, I was promoted to GS-9. In July of 1966 I was promoted to Grade 11. On November 15, 1970 I was promoted to supervisory criminal investigator of the CIN unit at New York.

Q When you say the CIN unit, what does that refer to?

A We are charged with investigating criminal, immoral and narcotic activity within the district.

Q In June of 1968 you were a GS-11 investigator. At that time did you file an appeal to the Civil Service Commission?

A That is correct.

Q What were you requesting in that appeal?

A I was requesting in that appeal reclassifica-

tion to the next higher grade, GS-12.

Q Would you describe to the court the kinds of cases on which you were working at that time and why you believed these cases to be at the GS-12 level?

A I was working the most complex cases that the service had within my particular sphere, which was general investigations at the time.

There were no GS-12 investigators within general investigations and therefore, obviously, all work that came in that was denominated as general investigations work had to be done by investigators at the GS-9 or GS-11 level. The most complex work that came into the unit was handled by the GS-11 investigators.

Q Will you describe examples of the kinds of cases on which you spent your time?

A Yes, certainly. I spent time on investigations such as I had an investigation which involved a strike on the part of Qantas Airlines, employees of Qantas Airlines, and the Qantas organization had been accused of bringing in strikebreakers from their native country and using them here in the United States in violation of law. They had been accused of bringing them into not only here at New York but also at

Hawaii and on the West Coast where Qantas has service installations.

The union here in New York and also in Hawaii was very upset about strikebreakers being brought in to circumvent the effects of what they considered to be a legitimate strike, and I was assigned this investigation, which required a considerable amount of time, it required taking sworn depositions from each and every alleged strikebreaker from the head of the Qantas organization here at New York, from the head of BOAC here at New York, and coordinating this with our people in Hawaii who were conducting a similar phase of the investigation at that end. I was involved in investigations which took me into the home of the former Prime Minister of China out in Nassau County, and this involved an employment by the former Prime Minister of China of two Chinese crewmen who had jumped ship.

At that time I was also involved with the family of the former Prime Minister of China, that is, the Hon. Mr. Cong and his wife, who is married to the vice air attache of Nationalist China attached to the United Nations.

I was involved in cases, numerous cases, six preference petitions, as they are known, and

these involved individuals who at that time were being petitioned ror by organizations of various kinds, some rather large and prominent, others not so, people who, because of their expertise in particular fields, were attempting to be brought in into the United States to perform certain types of labor that were deemed to be in short supply here.

I was charged with investigating the bona fides of this type of application, whether or not the organization involved in effect needed the services of such an individual or whether it was an accommodation. These investigations are lengthy, they are comprehensive, they involve going over the business records of the organization, they involve in-depth investigation in order to determine whether or not this individual is really qualified and whether the petition shown is a bona fide petition.

With regard to other types of investigations, I did a considerable amount of school investigations, and these related to schools who were bringing in foreign students and allegations of fraud and misconduct on the part of the schools in permitting these students to come in and while they were ostensibly going to school they were gainfully employed on a full-time

basis. And, in effect, some of these schools were only mills for these individuals who wanted to gain entry to the United States.

Q When a particular school was investigated, would this involve just a single case or would you state whether or not it would involve --

A No. At its inception we would get an allegation. I investigated one school in particular, the Washington Business Institute, and at the end of my investigations I had ended up with 27 collateral files of students who were all not attending school and whom the school had certified as attending; and when the investigation and inspection of the school's records had been completed, it was shown that the school was involved in a sham situation.

This file was eventually transferred to our frauds unit at the request of my supervisor at the time.

Q Mr. Opolion, did you believe at the time that you filed your appeal, and do you believe now, that you were working on cases of the kind you just described for a majority of your time?

A I have no doubt about it.

Q Would you please describe to the court what

happened subsequent to the filing of your appeal on June 8, 1968 in more or less chronological form, describing each event as it happened?

A To the best of my recollection, the sequence went as follows. After the appellants had filed their appeal with the Civil Service Commission --

Q When you say the appellants, whom are you referring to, sir?

A I am speaking about myself and I believe a group of Grade 11 investigators who were similarly located in general investigations and perhaps other areas of investigative activity in the New York district who had filed together.

I believe what happened after we filed out appeal, I recall that my supervisor requested that I submit to the audit of the Immigration Service all those cases that I felt were in contention. I submitted all the cases that I felt were of a GS-12 caliber. At the time I thought it was rather curious that, having sent my appeal to the Civil Service Commission, I was being requested by the Immigration Service to submit to an audit. I couldn't really fathom how they had come to know that I had even filed an appeal since I had not sent any communication to the Immigra-

tion Service that I was doing so. However, I did submit to their request.

The supervisor who I was working for at the time indicated that there would be Immigration classifiers who would be coming in to speak with the appellants.

Q What was the name of the person who made that statement to you and approximately when it was made?

A I am not certain, I am not absolutely certain who the supervisor was.

Q But what was his position then?

A He was my next line supervisor. It would have been a Grade 12 supervisory investigator at the time. I am not certain exactly who it was who made the request.

Q Go ahead with your testimony, sir.

A I indicated to the supervisor that I had no objection to anyone seeing these cases that I felt were in contention, but that I had absolutely no intention of speaking to any Immigration classifier because I felt that it was highly improper of any Immigration classifier to audit me when my grievance was with the Immigration Service, and I felt that my appeal for a redress was with the Civil Service Commission.

Q What transpired subsequently?

A To the best of my understanding, the Immigration classifiers did come in, and inasmuch as they could not speak to me or to the other appellants, they did review these cases that were submitted.

Q Were you subsequently contacted by a Mr. Friedman of the United States Civil Service Commission?

A Yes, I was.

Q Would you explain to the court how this came about and what was said?

A I had seen Mr. Friedman in our office for long periods of time, and I had gathered that he was there on the mission of conducting audits on behalf of the Civil Service Commission. I had seen him spend an unusual amount of time with the supervisory investigators, practically all over the floor, and the word on the floor was that Mr. Friedman would eventually get around to talking to the appellants.

Q Did there come a time when Mr. Friedman spoke with you?

A Yes, there did.

Q Explain the nature of this conversation and its duration in time?

A I don't recall exactly what the time se-

quence was in terms of the exact month that he spoke to me. I would suppose that it was some time in the fall of 1968. I was told by my supervisor that Mr. Friedman would see me, and I was ushered into one ofthe interview rooms at the Immigration Service.

Mr. Friedman asked me to sit down. We had an amiable chat of perhaps five minutes' duration.

Q Would you explain what was said by Mr. Friedman and what was said by you during the course of this discussion?

A Mr. Friedman introduced himself, he told me what his purpose was. He wanted to know from me why I felt that my job was of such a nature that my position should be reclassified to GS-12.

Q Did he ask you this question first? Was this the first thing he said or was there a preliminary discussion?

A I believe at the very onset Mr. Friedman, as a matter of curiosity to himself, asked me why I did not see fit to submit to the Immigration audit that was done since it was common knowledge that all the appellants had refused to submit to the interviews.

I told Mr. Friedman that I felt that the

proper forum for my grievance was with the Civil Service Commission; I was looking for redress from them. Since my grievance was with the Immigration Service, I did not feel that this was the proper forum where I should be discussing my grievance.

Q How much of the five minutes you testified the discussion took was spent in discussion between you and Mr. Friedman of why you were not willing to submit to the INS audit?

A I would say that a major portion of the time was involved in discussing why we refused to submit to the appeal -- rather to the audit by the Immigration classifiers.

I think this is conjecture on my part, I admit, that Mr. Friedman was perturbed. He was perturbed why we would not submit to this audit. I simply told him that I felt that I wanted my hearing before the Civil Service Commission.

Q In the remaining few minutes that Mr. Friedman spent with you will you tell the court what discussion there was with regard to the kinds of cases that y ou worked on?

A In the remaining time that I was in the presence of Mr. Friedman he asked me why I felt I was

doing Grade 12 work. I told him in a very cursory, in a very sketchy fashion, since there was no opportunity to go into any of the cases, there were no files on the desk, there were no files being reviewed, I told him in a perhaps even more sketchy fashion than I have told the court why I felt I was doing Grade 12 work --

THE COURT: What did you tell him?

THE WITNESS: I told him some of the cases that I have related here.

THE COURT: Just recount it to me. Put me back into the conference between you and Friedman. He said to you why do you think you are entitled to Grade 12 and are not doing Grade 11 work. What was your answer?

THE WITNESS: My answer was that I was doing Grade 12 work, and I recounted the Qantas case, I recounted the case referring to the former Prime Minister of China, I recounted six preference cases, I recounted orphan petition cases, I spoke to him about school cases. But this was all in a cursory fashion because we did not have files that we could go into that he could examine and say to me, "Well, why this and why that?" It was simply "What type of case?" and I told him the type of case, and he thanked me very

much, and told me I would hear from him. That was the end of it.

THE COURT: To sum up what you told him, you told him that you had cases that you considered cases of importance. Is that why you wanted a Grade 12?

THE WITNESS: Your Honor, I could not tell him more --

THE COURT: I am not asking you whether you could or you couldn't. I am just asking what the impact was that you tried to create on him. Were you reaching out to tell him that you associated yourself with cases of importance and prominence? Is that the burden of what you said to him?

THE WITNESS: Absolutely.

THE COURT: Is that the reason why you think you are entitled to lw and not ll?

THE WITNESS: I believe I am entitled to Grade 12 because I feel that the cases that I was handling were of a complexity that entitled the investigator handling these cases to that classification.

THE COURT: What did you understand a Grade ll investigator -- how a Grade ll investigator

differs from a Grade 12 investigator in that respect?

THE WITNESS: I think the difference between a Grade 11 and a Grade 12 investigator is a difference in degree, not a difference in kind. I believe that a Grade 11 investigator handles investigations of complexity and when that complexity goes beyond a certain level --

THE COURT: What is that level?

THE WITNESS: That level admittedly is a shadowy level, it is a level I believe that statutorily defies precise scientific definition. I believe that it is to a certain degree subjective. But I do believe that it is an attainable standard.

THE COURT: Let me read to you from the Grade 11 classifications:

"Assignments at this level usually involve multiple issues, . . ."

Certainly the cases that you had involved multiple issues, is that right?

THE WITNESS: That is correct.

THE COURT: ". . .have a potential for developing into a number of individual cases, . . ."

THE WITNESS: That is correct.

THE COURT: ". . .consistently require

unusual skill and ingenuity and in uncovering and developing facts. . ."

THE WITNESS: That is correct.

THE COURT: ". . .and because of the seriousness of the violations or actions involved or the prominence of the individuals involved are either greater in their effect as deterrence to further violations or have a greater protective value to the economy and security of the country than the investigative assignments at the next lower level."

Didn't that describe pretty much what you were telling Friedman about?

THE WITNESS: I don't believe that the classification as you read it, your Honor, described what I was doing in terms of complexity. As I said before, complexity is a subjective sort of thing. What is complexity?

THE COURT: Let me ask you this. Is this a fair description of what you were doing: to consistently require the exercise of unusual skill, resourcefulness and ingenuity in ferreting out information and developing facts which have been skilfully concealed over long periods of time? Does that describe what you were doing?

THE WITNESS: I believe that is accurate.

THE COURT: And in locating and securing the cooperation of witnesses who can furnish information and are willing to assist the government in spite of potential personal danger and harassment; is that descriptive of what you were doing?

THE WITNESS: Not particularly.

THE COURT: Investigative assignments frequently result in the presentation of novel issues for administrative or judicial decision and unusual problems in coordinating phases of investigations with other agencies where dual or conflicting jurisdictional problems are involved; did that describe what you were doing?

THE WITNESS: No.

THE COURT: In what respect did it fall short of what you were doing?

THE WITNESS: Your Honor, in the New York district we have a very specialized situation. We have a criminal unit, we have a prosecutions unit, we have a general investigations unit, we have a frauds unit, so that the work is necessarily comparmentalized and one may not be able to go into each and every phase of the investigation as you see it in the classification

standard.

So that if I were uncovering a fraud with regard to a school and I had now gathered 27 collateral files and I was onto a major fraud investigation which, were in in any other part of the country I could continue with and successfully conclude, in the district of New York I would have to takt this mass of files and transfer it to the frauds unit.

THE COURT: It says here "That the following are typical of investigative assignments at Grade 11: Frauds where there is some evidence of a conspiracy or of widespread scope."

There is another category: "Identification of individuals named in various crime commission investigations and development of sufficient evidence to establish their citizenship or alienage and status in support of revocation of naturalization or deportation proceedings where appropriate or criminal proceedings under the penal provisions of the governing laws."

Have you said anything different than that?

THE WITNESS: I may not have said anything different in kind, but I do believe there is an essential difference in degree.

THE COURT: It all gets back to the question of the degree?

THE WITNESS: I think, your Honor, in all fairness, in all honesty, and I think in this court we are looking for fairness and we are looking for honesty, I think all of us are, we are talking about a very, very subjectife field --

THE COURT: Subjective to whom? Subjective to the investigator?

THE WITNESS: No. I believe it is subjective to everyone who looks at it. It is subjective to management, it is subjective to the investigators, because these are shadowy distinctions.

If I go out and I, on the very highest level, conduct an investigationof the Qantas organization, one man may very well say thst is Grade 12 work. Another person may say, "Well, I looked at the job description, it could go as an 11." Honest men may differ on it. However, I think the prepoderance of feeling on the part of people who do this work, and perhaps if we went from agency to agency to view the complexities of what Grade 12s do in other agencies, I think people would tend to agree that this is complex enough to fall into a Grade 12 category.

lha Opolion-direct

THE COURT: Now let me see if I can't approach it at another level.

It is perfectly clear that federal employees, including judges, have a feeling -- reporters also -- have a feeling that they are entitled to a level of compensation which meets their standards and station. Was it the standard of compensation and the difference in the standard of compensation that was really at the root of this subjective determination?

THE WITNESS: I think you can't divorce yourself from compensation. That would be an untruth, obviously. But I think it is a fair day's pay for a fair day's work. I don't think it is trying to put your hand in somebody's pocket and to get an extra $20 bill on a per-day basis, or whatever the amount - -

THE COURT: You don't have to sell me on the idea that the government pays too little. I know all about that. The question is now, what was the base pay before the step increases in Grade 11 and Grade 12, do you remember?

THE WITNESS: I don't recall.

THE COURT: At least there must have been, what, about a $1500 spread? There may have been $1000 -- at that time there may have been a $1000 or $1200

time on the kinds of cases which you just described?

A I think on a qualitative basis I would have to have before me all the files that were in question at the time, and where the interviewer could case by case go down the case with me and find out just how much time I alleged I was spending on the case, he could make his own determination as to whether he felt this was a fair representation of time in terms of investigative effort, and then on a cumulative basis see how much time I was devoting to these caliber cases in relation to the less complex cases of which I may have been resolving more but in a much shorter period of time.

Q Mr. Opolion, I would like to show you Defendants' Exhibit B, on pages 5 and 6 and 7, which is the letter of decision in your case, signed by Mr. Baer, the regional director of the Civil Service Commission. In particular I invite your attention to the last paragraph on page 6 which contains the conclusion that you were spending more more than 15 per cent of your time on cases which are enumerated there, and I ask you whether in the course of your interview with Mr. Friedman anything was said or discussed by you with him which would provide any kind of a basis for

a percentage finding about your work of the kind that is contained in the last paragraph on page 6?

A None whatsoever.

Q Did you at any time or were you at any time given the opportunity to explain to Mr. Friedman the actual perctnage of time, of your time, which you were spending on the cases which you regarded at GS-12 level?

A Not at all.

Q Did Mr. Friedman take any notes during the course of your discussion?

A I did not recall seeing Mr. Friedman take any notes at the time of our interview.

Q How did you ultimately become a GS-12?

A I was appointed to the grade supervisory investigator 12 on November 15th of 1970. I believe that this was a corrective promotion in accordance with the provisions in the administrative manual. It related to a situation which had occurred some time before where two investigators had been promoted to Grade 12 out of sequence. That is to say, on a promotional basis their scores were lower than my score or that of a number of other people, and in error they had been promoted prior to my promotion, and as a con-

sequence the Service took the position that the next protions that would take place would bethose of the individuals who had been passed over and who should have had the promotions prior in time.

MR. ADAMS: Your Honor, I'd like to make a motion to strike that question and answer as being entirely outside the scope of this case as to how Mr. Opolion was promoted in 1970. There is not one word of that in the complaint or in any of the contested or uncontested facts submitted or in any of the motion papers in this case for five years.

MR. ROTHSTEIN: I would join with defense counsel in that motion. I merely sought --

THE COURT: Motion granted. Motion granted on consent. You both agree, that's it.

BY MR. ROTHSTEIN:

Q When were you in fact promoted?

A November 15, 1970.

Q Was it in any way --

THE COURT: You see how quickly you can decide something. You don't need a lot of talk. I haven't spent five minutes trying to get an explanation from them. Two fellows agree, enough.

Q Was your promotion in any way connected

with your classification appeal that you filed?

A Not at all.

MR. ROTHSTEIN: No further questions.

CROSS EXAMINATION

BY MR. BARTH:

Q Mr. Opolion, in connection with your appeal, I believe you mentioned during your testimony that you prepared some type of written material; is that correct?

A I did, indeed.

Q Could you describe what was in that material?

A Yes. The material contained a listing of those cases that I felt were of a Grade 12 complexity.

Q Isn't it a fact, Mr. Opolion, that these materials, this letter that you were talking about, was sent to the Civil Service Commission?

A That is correct.

Q I'd like to show the witness pages 47 through 65 of Exhibit B.

Mr. Opolion, I am going to turn the pages quickly here to page 60. Is that your signature, sir?

A That it is.

Q Do you recognize those pages I pointed out to you?

A Yes, I do.

Q As material you prepared?

A Yes.

Q For the Civil Service Commission?

A Yes.

Q You referred here during your testimony to a Qantas casee.

THE COURT: The force of those pages 47 to 70 of Exhibit B is a recital by the witness of his cases and their relative importance, is that the point?

MR. BARTH: Yes, your Honor. There is one more point in there, though. I'd just like to point it out.

THE COURT: Go ahead.

Q You spoke about the Qantas case this morning and you mentioned that at least you didn't recall Mr. Friedman asking you what percentage of your time you spent on the case; is that correct?

A That is correct.

Q I'd like to draw your attention to page 49 of Exhibit B, and could you tell us if you did point out to the Civil Service Commission in your own writing the amount of time that you felt that you spent on that case?

A I did.

Q How many hours is that, sir?

A 48 hours.

Q I believe we also spoke about -- you also spoke about this morning investigating or being involved in an investigation that required you to interview the Prime

Minister of China; is that correct?

A That is correct.

Q I draw your attention to page 48 of the record. Didn't you in fact tell the Civil Service Commission in your view how much time you spent on that case?

A That is correct.

Q How many hours is that, sir?

A Ten hours.

Q You mentioned, Mr. Opolion, that prior to Mr. Friedman's interviewing you that the word was around that he was going to come around and see some people?

A That is true.

Q He did interview you?

A That is true.

Q Did he interview the rest or the members in the general unit who were appealing at that time?

A I believe so.

Q Was that the word? The word was around that he in fact did interview --

A I know some of the people that he did interview. I cannot say that he interviewed everyone because I was not that familiar with each and every one of the appellants.

Q But there wasn't a word around that he didn't

interview people, was there?

A I have no reason to believe that he didn't interview everybody.

MR. ROTHSTEIN: Your Honor, I would object to the answer. The witness was not in a position where people were reporting to him on any kind of a business or formal basis. I think it is strictly hearsay and speculation.

THE COURT: But your statement is strictly hearsay and speculation also, and, besides which, it is of an evidentiary character and it is not in order. Your objection, to the extent that there was any objection, is overruled.

MR. BARTH: We have no further questions, your Honor.

MR. ROTHSTEIN: No redirect, your Honor.

THE COURT: Thank you very much, Mr. Opolion.

(Witness excused.)

MR. ROTHSTEIN: The plaintiffs call Mr. Vincent A. Burke.

- -

I had assigned to me at that time were what are called non-priority cases. Those are cases in which you have a deportable alien, but whom the Service does not want to actually require to depart from this country because of compassionate reasons.

Those cases have to be reviewed annually and a determination made that the alien is still deportable and still has the compassionate need to keep it in a non-priority category. That was one phase of my work.

I was supervised then by a Grade 12, James M. Keenan. Whenever he was absent from his desk, I took over and did his work as supervisor. That's for 26 days of annual leave and 13 days of sick leave, which would make a total of 39 working days.

Q What was the grade of the person whose work you were doing?

A Grade 12.

Q Go ahead, sir.

A Then I was also asked to substitute for the liaison officer, the man who was liaison with the Southern District and the Eastern District, as far as prosecutions were concerned in both districts. I substituted for him for his 26 days of annual leave and his 13 days of sick leave.

Another phase of my work was substituting for the head of the processing unit. This is the unit which issues all orders to show cause and warrants of arrest in deportation cases. In that capacity I had to direct the activities of several investigators who were interviewing aliens in that area to make a determination as to whether an order to show cause or a warrant of arrest should be issued.

Those were several invesigators in that immediate area. However, all investigators on the floor who believed that they had a deportable alien in their hands would have to bring their papers to me for me to make a determination as to whether an order to show cause or a warrant of arrest should be issued. If I believed that it should, either one should be issued, then I would go upstairs to the District Director with the order to show cause all prepared and the warrant of arrest, if necessary, and place them before him and he would sign them.

Q What was the grade level of the man who was the chief of the processing unit that you were filling in for during his 26 days of annual leave and 13 days of sick leave a year?

A In 1967 he was reclassified as Grade 12 after the District Director had --

THE COURT: When you were doing this work, what was his classification?

THE WITNESS: 11 and 12. The District Director had made a determination that he had been doing Grade 12 and Grade 13 work, and for that reason they re-classified him and made him a Grade 12.

Q During this period of time did you also take 26 days of annual leave and 13 days of sick leave a year?

A Yes.

Q The work that you did in substitution for the three men you mentioned, I ask you whether that work formed the basis for the classification appeal which you filed?

A Yes.

Q Did you believe based on that substitution that you were performing Grade 12 work for a majority of your time?

A Yes.

Q Were you subsequently interviewed by any representative of the Civil Service Commission?

A By Mr. Friedman, yes.

Q How long did this interview take?

A Roughly take 20 minutes, give or take a few minutes.

Q Would you describe for the Court, please,

exactly what was said during the course of this 20-minute interview?

A He asked me to describe the work that I was doing and the cases which I handled, and he made a few notes on a yellow pad, and then he said he would let me know what his decision was.

Q Did Mr. Friedman look at any of your files?

A No.

Q Did he discuss with you the amount of time you were spending on particular cases?

A No.

Q Did you indicate to him that you were substituting for three people for what you believed to be a majority of your time?

A Oh, yes.

Q Did you explain to him the nature of your duties in the course of such substitution?

A Yes, I did.

Q Subsequently you received a letter of denial on February 1, 1967; is that correct?

A Yes.

Q Following that letter of denial, did you attempt to review your file at the Civil Service Commission?

A Yes, I did.

Q Would you explain when you attempted to so review your file and what transpired at that time?

A I think it was a month or two after I had talked to Mr. Friedman and I went with some others to the Civil Service office in the News Building on 42nd Street, and I was shown a file which had I believe one page of yellow foolscap, and as I recall it at the time there was just a conclusion that I was not doing Grade 12 work for a majority of my time.

Q Did you have any conversation with any person at the Civil Service Commission at that time as to what was contained in your file or what was not contained in your file?

A Well, I was surprised that there was only this one piece of paper in the file, but the clerk -- I imagine it was a clerk there, he just said, "Well, that's all there is to it."

Q You subsequeently appealed to the Bureau of Inspections, did you not, with the others whose appeals were denied?

A Yes.

Q Were you interviewed subsequently by Mr. Friedman or any other representative of the Civil Service Commission?

A No.

Q What was the result, sir, of the appeal which was taken by you?

A It was again refused.

Q It was denied, and you received a letter to that effect?

A Yes.

Q How did you then come to be classified as GS-12, Mr. Burke?

A I believe a memo was placed on the bulletin board on our floor which suggested that instead of going to the Civil Service Commission, that we go through channels in our own Service. So I wrote a letter to the District Director, Mr. Esperdy, in 1967. I think it must have been August or September of 1967. I explained the work I was doing and that I thought I should be reclassified.

Then some time in I think it was April of 1968 I received an answer from Mr. Esperdy in which he agreed that the majority of my work was Grade 12. He sent carbon copies to the central office and to the regional office, and some time after that I was reclassified to Grade 12.

Q I'd like you to take a look at Defendant's Exhibit Z, and I ask you if this is the memorandum which

you received from Mr. Esperdy?

I show you Defendants' Exhibit Z in evidence and ask you if this is the memorandum which you are referring to?

A Yes, it is.

Q I read to you from the last paragraph on page 1 of Mr. Esperdy's words:

"I carefully considered the resume presented by you and I have had the necessary discussion with your supervisors. I find that for a number of years past and continuing up to the present time you have spent better than 50 per cent of your time in substituting as a supervisor in the absence of supervisory Investigator Keenan, Investigator Totaro and Investigator Koerber."

I ask you, sir, whether you had provided any information to Mr. Esperdy which you had not also provided to Mr. Friedman and to the Civil Service Commission regarding your substitution for the three men mentioned?

A I gave him the same information.

MR. ROTHSTEIN: I have no further questions of the witness, your Honor.

CROSS EXAMINATION

BY MR. ADAMS:

Q What was your grade level at the time of your retirement?

A 13.

Q You testified that you appealed your grade classification along with 54 other investigators in 1966; is that correct?

A That's correct.

Q Had you appealed your grade classification prior to that time?

A I don't believe so, no.

Q Your appeal was denied by the regional office of the Civil Service Commission; is that correct?

A Yes.

Q You took a further appeal to the Washington office and that was denied also?

A Yes.

Q That denial from the Washington office took place or you got notice of that around June, 1967?

A June or a little bit earlier, I think.

Q You said that the only cases you had were non-priority cases, what are described as non-priority cases; is that right?

A Right.

Q That involves a decision by the Immigration Service as to whether or not to press deportation of someone who is deportable technically under the law; is that correct?

A That's correct.

Q And this involved an investigation into various compassionate factors that might be for or against putting a person in a known priority status?

A Well, yes, but it also required investigation as to the alien's exact status. On my review I often found that the aliens were not deportable and there was no need to put them in non-priority status.

Q Mr. Burke, did you make a recommendation as to whether a person ought to be put in a non-priority status?

A Sometimes. At other times other individual investigators who had handled the cases made the recommendation, and then it was pssed through me to the District Director --

Q Did it go through your supervisor first? But then it went to the District Director?

A Yes.

MR. ROTHSTEIN: May the record show that the

witness shook his head "No" in response to the last question?

THE COURT: The record will do this. We will go back to the question and find out what the answer is vocally.

(The reporter read the record as follows: "Did it go through your supervisor first?")

A No.

Q But then it went to the District Director; is that correct?

A Yes.

Q Did the District Director then transfer the matter up to the central office for final determination?

A To the regional office, and then from the region to the central office.

Q Mr. Burke, you said you substituted for a certain number of days for Mr. Keenan who was the supervisory GS-12 worker?

A That's right.

Q You substituted for a number of days for a Mr. Koerber; is that correct?

A Yes.

Q Am I spelling his name correctly when I spell it K-o-e-r-b-e-r?

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A That's correct.

Q Mr. Koerber was a man who was appealing his grade classification at the same you were, isn't that correct?

A I think so.

Q Wasn't his grade classification turned down? Wasn't his appeal turned down?

A I believe his appeal was turned down, but he was reclassified in 1967, but not on appeal, I think.

Q During the time that you were appealing to the Civil Service Commission, Mr. Koerber was a GS-11 who was appealing at the same time; is that correct?

A That's correct.

Q And the Civil Service Commission turned down his appeal at both levels at the same time your appeal was turned down?

MR. ROTHSTEIN: I object, your Honor, in that a basis hasn't been established by counsel for the question.

THE COURT: Overruled.

A I believe he was given his reclassification through the efforts of Mr. Esperdy, the District Director, also, that he certified that he was doing Grade 12 work and therefore he was reclassified. But on the appeal --

Q I am not disputing your answer. Mr. Totaro

was a man that you substituted for too; is that correct?

A That's correct.

Q And it was your substitution for him during certain days of the year upon which you based your classification appeal in part?

A Yes.

Q And during time you were pushing your clasification appeal, Mr. Totaro was a GS-11, was he not?

A He was until 1967 when they reclassified him.

Q And he was reclassified by the Immigration Service and not by the Civil Service Commission?

A I believe so.

Q Mr. Burke, when you stated that you went over to the Civil Service Commission office at your appeal, you saw notes in your file; is that correct?

A Yes.

Q Were those notes handwritten notes?

A Yes.

Q They were on yellow foolscap, what we call a legal size page?

A Yes.

Q Then you appealed through the agency itself, the Immigration Service, to Mr. Esperdy; is that correct?

A That's correct.

Q And Mr. Esperdy recommended that you become a GS-12 and subsequently you became a GS-12?

A That's correct.

Q Did you take on supervisory responsibilities?

A Oh, yes.

Q About when was this? 1968?

A Yes.

Q Did you have instructions that were given to you as a supervisor as to the proper allocation of GS-12 level cases?

A Yes.

Q How did you get these instructions?

MR. ROTHSTEIN: Your Honor, I object as beyond the scope of direct examination.

THE COURT: Overruled.

A Through my supervisor, Mr. Spivack.

Q In what forum? Did Mr. Spivack have meetings?

A Oh, yes. We had meetings at least once a week. Mr. Keenan, Mr. Kaye, Mr. Greenman and myself, with Mr. Spivack, and he would instruct us to the effect that he had been instructed by the regional investigations office to see to it that the Grade 11's did not get Grade 12 work because they had already made a few Grade 12's at that time.

Q Were you instructed to try to assign Gs-11 work to GS-11 investigators and GS-12 level work to GS-12 level investigators?

A That's correct.

Q Did anybody from the regional office also give you those instructions?

A No. We would know, of course, when someone from the regional investigations office would visit the New York office, and right after their appearance we would received the instructions again from Mr. Spivack. The difficulty, however, arose not from assigning cases but from having the Grade 11's develop the cases into Grade 12 standards.

Q Let me just clarify. You mean a case would actually change its nature during the process of investigation?

A Oh, yes.

Q And the investigator would be doing the work of investigating it and the case might either get more complex or it even might get less complex sometimes, I suppose?

A It's possible. But I could give you an example. For instance, if you --

Q Why don't I ask you the questions and I think

I want to get what --

THE COURT: Did Grade 11 cases ever peter out and get down to be Grade 9?

THE WITNESS: They could have.

THE COURT: So that they went up or down depending upon the inherent circumstances of the case?

THE WITNESS: Depending upon what the investigator was able to develop.

THE COURT: Or not develop?

THE WITNESS: Or not develop.

Q If a case became more complex, they went from one level of difficulty to another level of difficulty, did the investigators tend to try to keep that fact a little bit undercover?

A Well, they didn't take many steps to bring it to the supervisor's attention that it was becoming more complex until it had reached a certain stage of complexity.

THE COURT: Why was that?

THE WITNESS: They were appealing their classification, and they didn't want to have what was definitely a Grade 12 case taken away from them. You see, these instructions to give 11's only Grade 11 cases and give 12 cases to 12's, those instructions came out only after the appeals went in.

Q When you say the appeals, you are talking about the appeals in 1966 that you joined?

A That's correct.

Q Mr. Burke, I just want to go back and cover one point again. I am sorry, I tried to take this chronologically. Were there a number of investigators who went to Mr. Esperdy and submitted their case to Mr. Esperdy after they had submitted their case to the Civil Service Commission?

A I believe there were several, yes.

Q And you were among them?

A Yes.

Q And Mr. Koerber was among them?

A I believe so.

Q And Mr. Totaro?

A Yes.

Q Do you know whether Mr. Totaro even went to the Civil Service Commission?

A No, I don't.

Q It is possible he didn't even appeal to the Commission, isn't it?

A That's quite possible, yes.

Q Were there others? Let's date this. This was some time after the Civil Service Commission had

acted on the appeals of the 54 investigators; is that correct?

A Yes.

Q Within a month or two?

A I think so.

Q Were there any others?

A I think Jack Reilly was another one.

Q Did he get upgraded by Mr. Esperdy?

A Yes.

Q Were there any others?

A I think there were about five or six altogether.

Q Were there some that did not get recommendations for upgrading from Mr. Esperdy?

A People who had requested Mr. Esperdy to do so?

Q Yes.

A I can't recall any.

MR. ADAMS: We have no further questions, your Honor.

MR. ROTHSTEIN: One or two questions on redirect.

REDIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Burke, did you personally when you were supervisor ever remove any Grade 12 level cases from a GS-11?

A No.

Q Why didn't you?

A I thought if a Grade 11 investigator developed his case into a Grade 12, he should keep it.

Q Do you know if there were other supervisors who felt that way?

A Well, I know that some supervisors expressed regret at taking cases away from 11's. I don't know of any supervisor who refused to take it.

Q But your testimony is that you permitted the case to remain with the 11 when it came to your attention that it was a 12 case; is that correct?

A Yes.

MR. ROTHSTEIN: No further questions.

MR. ADAMS: No further questions, your Honor.

THE COURT: Thank you.

(Witness excused.)

(Recess.)

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MR. ROTHSTEIN: Plaintiffs call Mr. James J. Rowland.

J A M E S J O H N R O W L A N D, called as a witness by plaintiffs, being first duly sworn, testified as follows:

THE COURT: See if you can't shorten this because there are very few points being made here and they are being stretched out like a piece of taffy.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Rowland, would you briefly describe to the court your occupation and the positions you have held with the Immigration and Naturalization Service?

A I am a supervisory criminal investigator, GS-13, stationed at the New York office of investigations.

Q Would you describe the positions you have held with the Immigration Service in your career?

A I began in the Immigration Service in 1951 as a border patrolman. I transferred to New York approximately one year later. In 1952, when the McCarran Act went into effect I went into investigations. In 1959 I transferred to the Virgin Islands. In 1960 to San Juan, Puerto Rico and from there back to New

York.

Q Would you describe, sir, the kinds of cases on which you were working between 1959 and 1966?

A In 1959, as a GS-9 in Puerto Rico, I was working top-level subversive cases -- that was in 1960; excuse me -- top-level subversive cases and criminal cases. In particular, I was the control on an investigation which related to the President of the July 27th movement, which was a Cuban organization, and this was a top-priority case, classified so by the INS Service.

Q When did you come to the New York district?

A In the summer of 1962.

Q Would you describe the kinds of cases, giving representative examples that you worked on between 1962 and 1967?

A Yes. When I came back to New York, I was placed in the Subversive Section because of the work I had been doing in San Juan, Puerto Rico, which had been mentioned to me. As a result of this I was placed in the Subversive Section in the New York office. Being in the Subversive Section, I handled cases of a sensitive nature dealing with the national security of the United States, very high complexity, with international implications attached to the investiga-

tion.

Q Would you give the court some representative examples without mentioning the names of the subjects of the investigation?

A Yes. At the time the July 26th movement and its members were involved in investigations being conducted by the Subversive Section. Also, the 14th of June organization, which was a Dominican subversive group. Those members were also being investigated.

The investigations ran the gamut from high-level people in these organizations down to midlevel. Those that were of low level, they were not considered to be of a consequence for thorough or lengthy investigations. Time was spent mostly on midlevel, upper-type individuals.

Q Now, you filed a classification appeal in 1966, is that correct?

A That's correct.

Q And were you contacted by any representative of the Civil Service Commission?

A I was.

Q Who were you contacted by?

A I was contacted by Mr. Scheiner.

Q Do you know approximately when Mr. Scheiner

spoke with you?

A I believe in the fall of '66.

Q How many months after you had filed your appeal did he speak with you, approximately, the best you can recollect?

A The best I can recollect, I would say some time possibly two months -- I am not sure -- a month or some time in the latter part of '66, I am pretty sure.

Q But it was in the latter part of '66 that you spoke with him?

A Yes.

Q About how much time did he spend with you?

A He spent approximately one hour with me.

Q Describe to the court exactly what happened during the course of this interview.

A We went into a room. Mr. Scheiner sat on one side, I on the other. There was a table in between. Mr. Scheiner had in his hand a 3 x 5 card which was empty at the beginning of the conversation. I talked for an hour at great length on the cases that I was working on. And Mr. Scheiner was doodling on a 3 x 5 card.

Q When you say he was doodling, could you see

what he was doing?

A The best I could determine, he was making lines and circles.

Q Were there any words written?

A Not that I could determine.

Q Go ahead, sir.

A Halfway through, I said, "Mr. Scheiner, I've been talking for a half an hour and you haven't taken any notes," so he said, "That's okay. Just continue talking," so I continued talking for another half an hour and the interview was terminated. I left the room. And that was the end of that.

Q Did Mr. Scheiner ask you how much time you were spending on any particular case?

A Not that I can recall.

Q Did Mr. Scheiner look at any of the files of any of your cases?

A I don't believe so.

Q Did Mr. Scheiner ask you any questions regarding your cases, specific cases?

A Not that I can recall.

Q Is it a fair summary of your testimony, sir, that you spoke for an hour while Mr. Scheiner sat and doodled on a 3 x 5 card?

MR. ADAMS: I object to that. I think the record speaks for itself.

THE COURT: Sustained.

Q Is there anything else that transpired during the course of the interview besides what you have testified to?

A Not that I can recall.

Q Did you subsequently appeal to the Bureau of Inspections in 1967?

A I did.

Q And what was the result on the appeal?

A On appeal I was reclassified to GS-12.

Q Prior to the filing of the appeal, did you attempt to review your file at the Civil Service Commission?

A I did.

Q Would you describe to the Court what happened during your attempt to review the file?

A Yes. I went to the office of the Civil Service Commission which at that time and may still be was located in the News Building on 42nd Street.

I inquired of I believe it was Mr. Baer, I cannot be too certain of the individual at the time but I do recall his name and speaking to him and I requested the, whatever notes the Civil Service Commission had in relation to the interview between myself and Mr. Scheiner.

For about five minutes they didn't know who I was. They then went into Mr. Scheiner's desk. He was not there at the time as far as I could determine -- at least I could not visually see him and they went through his drawers of his desk, the middle drawer, this drawer, that drawer, and then they went over to talk to somebody else and there was quite a discussion around the office at the time.

The, some of the people seemed to be upset.

They couldn't find any notes of the interview. I went into Mr. Baer and I was very disturbed over this and I mentioned to him, I don't know what's happening in the office but everyone is running around trying to find notes and cannot come up with anything.

So I said, "Okay, Mr. Baer, I would appreciate it if when you find the notes that I be contacted."

I was never contacted.

Q Did all of this happen subsequent to your receipt of a letter of denial from the Commission?

A Subsequent to, yes.

Q Were they able to locate any kind of a file, an appeal file, which they could show you?

A Excuse me. Appeal? You mean -- I went prior to the appeal. I went to the Civil Service Commission --

Q When I say appeal, I am referring to the original

which was denied?

A No.

Q I am asking you whether there was any file which they were able to locate and show you?

A No.

Q What documents did you wind up reviewing the day you went to the Civil Service Commission headquarters?

A None.

Q And did you ever receive any documents or information from the Commission to assist you in preparation of your appeal?

A No.

Q The work you have testified you were doing at the time of your appeal, did that change in any material way from the time you stated you began doing it until you were reclassified GS-12 based upon the granting of the appeal to the Bureau of Inspections?

A No, it did not change.

Q Would you explain your answer to why you believe it didn't change?

MR. ADAMS: I object to that question. I think that the question doesn't need an explanation.

THE COURT: Sustained.

MR. ROTHSTEIN: I have no further questions of the

witness, your Honor.

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Rowland, you were in the Subversive Section of the Investigations Branch in your district; is that correct?

A That is correct.

Q You were in the Latin American section of the Subversive Section?

A That's correct.

Q And you were primarily involved in investigating cases involving alleged subversives; is that correct?

A That is correct.

Q Did you file any classification appeal prior to the appeal that you filed in 1966 with 54 other investigators?

In other words, prior to that appeal where a group of investigators from New York appealed, had you filed any classification appeal before that time?

A Are you talking --

THE COURT: Was that the first appeal that you filed, when you filed an appeal?

THE WITNESS: Yes.

Q And after you received a letter from the Regional Office in 1967 in February denying your appeal, you requested reconsideration at the Washington, D.C. level; is that correct?

A I did.

Q After that reconsideration, you were upgraded to GS-12; is that correct?

A That is correct.

THE COURT: Do you happen to know whether an increase in the budget allowance for the Service was voted by Congress at that time?

THE WITNESS: I wouldn't know, your Honor.

MR. ADAMS: We have no further questions, your Honor.

THE COURT: Anything else?

MR. ROTHSTEIN: No redirect.

THE COURT: You may step down.

(Witness excused.)

MR. ROTHSTEIN: I call Mr. Peter Scalcione.

P E T E R S C A L C I O N E , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Scalcione, what is your occupation?

A I am a criminal investigator for the U.S. Office of the Immigration and Naturalization Service.

Q Would you explain briefly the positions which you

have held with the Immigration Service during your career with that organization?

A I joined the Immigration Service on December 13, 1962 as a GS-7, Criminal Investigator. I was subsequently promoted to a GS-9 Criminal Investigator one year later and three years after that I was promoted to GS-11 Criminal Investigator.

I am presently a GS-12 Criminal Investigator.

Q What position did you hold in February of 1968 at which time you filed a classification appeal?

A I was a GS-11 Criminal Investigator.

Q Would you describe the cases that you were working on and in particular any case that you consider major that was a part of your workload?

A At that time?

Q At that time and for two years preceding it.

A I was engaged in one case that occupied more than 75 percent of my time and that involved a Mr. R and an agency in Kingston, Jamaica.

Q What kind of an agency?

A It was a travel agency and from what I gather, it also involved itself in other activities, some brokerage house as well.

Q When was this case assigned to you?

A Approximately 14 to 15 months before I appealed.

Q That would be before February of '68?

A Yes.

Q And how did the case come to be assigned to you?

A It was assigned to me because the matter, the case had been transferred from Miami to New York and I was in the Frauds Unit and it was given to me because apparently they uncovered people entering the United States at Miami with C-1 transit visas at Miami who were destined to a hotel in Miami, and because of the fact that a group of these people were all destined to the same hotel and had come to the United States with the same visa, it didn't appear to have continued on their way to other areas in the Caribbean. The matter was transferred to New York.

Q At the time you received the case when it was transferred to you, how many separate individuals were involved or mentioned in the file?

A There were only several. I would approximate there might have been 10, perhaps 15 individuals mentioned as having entered the United States with the visas and going to the same hotel.

Q At the time you received the case was there any mention in the investigative reports of the possibility of the case developing or mushrooming based on the developments

which had already taken place?

A No. There was no indication. However, it appeared that since several of these people had entered the United States with similar visas and had gone to the same hotel, that there may be an indication of a planned conspiracy.

Q What did you do with the case after you received it, 14 months after your appeal?

A Well, I developed the case to the point where I was able to identify the principal involved in the international operation that was taking place as well as the source for the fraudulent documentation and the manner in which the documentation was obtained from the United States Embassy under false pretenses.

Q How many people were ultimately involved in the case as you developed it?

A I think it was more -- it was somewhere in the vicinity of 67 or 68 cases.

Q When you say cases, are you referring to individuals?

A Collateral cases -- both individuals and groups.

Q Were all of them assigned to you for investigation in connection with the principal case?

A Yes.

Q Was there any other investigator working with you?

A None.

Q What was the role of your supervisor in this case?

A To review my files periodically and to ascertain the extent of the development of the case.

Q How often did your supervisor review the case during this period?

A Once or twice a year.

Q At what point did you begin spending 75 percent of your time on the case as you testified you ultimately did?

A It started off slowly and then it began to snowball as one lead developed into another, it developed into another and, of course, it became arithmetic and geometric.

Q In what point in terms of months would you say that it occupied more than 50 percent of your time?

A I would say after six months or so.

Q In 1968 did you file a classification appeal with the Immigration Service?

A Yes, I did.

Q And do you remember approximately when?

A I believe it was February of 1968.

Q And what was the result of that appeal?

A I received a memorandum from the District Director advising me that my case was a borderline case, that because I didn't have the case at its inception, that made it less of

a borderline case.

Q I direct your attention to Government's Exhibit D at page 11, and I ask you if this is the memorandum that you are referring to.

A Yes.

Q Subsequently, did you file an appeal with the United States Civil Service Commission?

A I did.

Q What was the basis for that appeal?

A The basis was the fact that I was doing the GS-12 level work.

THE COURT: What was your salary at the time?

THE WITNESS: I don't recall.

THE COURT: What was the salary you were trying to get?

THE WITNESS: I don't recall.

Q In connection with your appeal, were you contacted by any representative of the Civil Service Commission?

A Yes, I was.

Q Do you know approximately when you were contacted by such representative?

A It was within the space of one or two months after I received my -- the memorandum from Mr. Esperdy, I believe it was.

Q Do you recall the name of the person?

A No, I don't.

Q Do you recall how he identified himself to you at the time he contacted you?

A Yes. The gentleman said he was from the Civil Service Commission and then that he was there on the basis of my appeal for reclassification.

Q Did he subsequently have a discussion with you with regard to your cases?

A Well, no. It wasn't more of a discussion but rather it was a very quick finding that my case was a borderline case and, somehow or other, since I didn't have the case at its inception, he couldn't consider it a GS-12 case which struck me as being very curious because he said almost the same thing as Mr. Esperdy said to me in the memorandum.

Q Do you remember if he used the same words Mr. Esperdy used?

A Well, he used the words "borderline case," which struck me as being curiously similar.

Q At the time you were having this discussion, did he look at any of the files related to this major case you were working on?

A No. He fingered it. He just opened the file and

sort of fingered it and he noticed that I didn't have the case from its inception.

Q Did he tell you what his grade level was?

A Yes. He said he was a GS-9 Civil Service Commission Examiner.

Q Did he make any other statements to you in connectionwith this interview that you had with him?

A When I attempted to have him, you know, look into the case and discuss its GS-12 merits, he was very lacka-daisical and he appeared to be, if not annoyed, then sort of turned off to the whole proceeding, and he said something to the effect that most people are content to live like their fathers and I think appealing for a GS-12 was like something you only expect out of New Yorker's.

Q Would you try to repeat the exact words on that?

A He said most people in the other parts of the United States are quite content to live like their fathers and that any attempt to get ahead and like that was a New York malaise.

Q Was this his response to your attempt to discuss the case with him?

A Yes.

Q Was this also the time that he told you what his own grade level was?

A Yes.

Q What ultimately was the decision on your classification appeal?

A It was denied.

Q And what ultimately was the resolution of the large case that you had been working on for 14 months?

A Well, with the cooperation of the State Department and the Jamaican authorities, the operations in Kingston, Jamaica ceased and Mr. R was apprehended by me personally in Brooklyn, New York and he was deported to his home country and there to be arrested by the authorities.

Q Was the case concluded at that time?

A Yes. Except for the remnant cases because what had happened was that many of the people who had come into the United States had gotten themselves involved in major frauds and ring-type operations in order to remain here so we had to look into those aspects of it so it took awhile to clean it up.

Q Did you clean it up?

A Yes.

Q Did any other investigator assist you in terminating this case?

A No. There were some investigators that helped out in the major frauds aspect of it. We had gone out together

on checking --

Q Eventually again what was the total number of subjects involved in this case?

A 67, I believe, or 68.

Q And were they related in a common scheme or conspiracy?

A Yes.

Q One final question. Will you describe during your period as an investigator with the Immigration Service the role of Supervisor Investigators?

A Well, they both --

MR. ADAMS: Your Honor, may I object. Mr. Scalcione has testified as to what his supervisor did with his case.

THE COURT: Sustained.

Q Would you state what your supervisors did during your period of service with the Immigration Service, what their role was and whether or not they ever actually performed investigations themselves?

A Their role was more administrative than anything else. Attempt to review our cases would be the only technical aspects involved and seeing to it that the direction of our cases was appropriate to the policies and the laws of the Immigration Service.

Q Did they ever go out into the field to perform investigations?

A Never.

MR. ROTHSTEIN: No further questions on direct, your Honor.

CROSS EXAMINATION

BY MR. BARTH:

Q When were you classified as a GS-12, Mr. Scalcione?

A I believe in March of 1970.

Q Was that as a result of an appeal?

A No.

Q You stated that with respect to the case involving Mr. R that you were working on it for about 14 months before you filed your appeal; is that correct?

A Yes.

Q Isn't it a fact, sir, that for 10 of the 14 months you weren't even working in the District Office?

A No. I was working in the office. I was temporarily detailed, I believe, to Washington, D.C. for about a six-week period.

Q I would like to show the witness page 17 of Exhibit D and I'll ask you if that is your signature on that letter, sir?

A Yes.

lhs

AFTERNOON SESSION

(2.35 p.m.)

MR. ROTHSTEIN: I call Robert Honan.

- -

ROBERT F. HONAN, called as a witness on behalf of plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Your address, sir?

THE WITNESS: 6555 Broadway, Riverdale, New York.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Honan, what is your occupation?

A I am a criminal investigator for the United States Immigration Service.

Q What position do you currently hold with the Immigration Service?

A Currently I am a GS-13 assigned to the Organized Crime Strike Force here in the Southern District.

Q Will you briefly outline the various positions which you have held with the Immigration and Naturalization Service?

A I entered the United States Immigration

Service in September, 1950 as a patrol inspector trainee at El Paso, Texas. I remained in that capacity for about two years and was promoted to investigative GS-7 in New York in 1952.

I was promoted to GS-9 investigator in New York in 1954 -- 1953 or 1954.

In 1958 I was transferred to Guam for two years as a supervisory immigrant inspector, GS-9. I returned to New York in October, 1959 as a GS-9, and in March, 1961 I was promoted to a GS-11 investigator at New York.

Then I was promoted again in February, 1970 to GS-12 as a criminal investigator in New York. My last promotion was on December 23 to GS-13, my present position.

Q Will you describe to the Court, please, the kinds of cases on which you were working when you became a GS-11 investigator?

A When I became a GS-11 investigator, most of my case work, in fact all of my case work, was of a criminal nature, criminal aliens, and some so-called top priority cases regarding organized crime figures.

Q Will you describe the top priority cases which you had in 1965 and 1966?

A Some of them probably are still under investigation --

Q You can mention instead of the name of a particular subject --

A I had one case dealing with an organized crime figure in the Bronx, notoriously known individual. Another gentleman was in the labor unions which I worked on. Then I would handle cases on requests for foreign governments regarding international type criminals who they were desirous of apprehending. That was the gist of it.

Q Were you doing this kind of work in 1966 when you filed the classification appeal with the Civil Service Commission?

A Yes, I was.

Q Did you believe at that time that you were performing Grade 12 level assignments for a majority of your time?

A I did.

Q Why did you so believe?

A Every type of case I had was of considerable importance. It was usually reportable to the central office in Washington or to the region, and they were just impressed upon me, the importance of

them, and the international ramifications and the personnel and people involved in this country.

Q Subsequent to the filing of your appeal, were you contacted by any representative of the United States Civil Service Commission?

A I believe I was, but I am hazy on the dates. It would be in I think the summer or fall of 1966.

Q Were you interviewed by any representative of the Commission?

A Yes, I was.

Q Do you remember who interviewed you?

A I believe it was Mr. Friedman.

Q How much time did Mr. Friedman spend with you?

A To the best of my recollection, 30 or 40 minutes at the outside.

Q Would you describe what transpired during this interview?

A Well, I went in and Mr. Friedman asked me to demonstrate the reasons why I thought my case load involved GS-12 work, and I recall discussing the situation with him in general and getting only into one specific case, which I presented to him and which he very casually glanced at, and that was the termin-

ation of the interview. I know I brought in several cases to be reviewed with him, but he only casually looked at the first one that I presented.

Q What did you say to him and what did he say to you with regard to the other cases that you say you wanted him to look at, which he did not?

A There was no discussion regarding them. As soon as he got through looking casually at the first case I presented, the interview was terminated.

Q How was the interview terminated?

A I believe he just got up and said, "Thanks a lot. Next."

Q The other cases that you had that you wanted to show him, did you believe that they were at the Grade 12 level?

A I believe they were because, being in all honesty, I would have shown him the best cases I had with me at the time.

Q Were you prepared to discuss those cases and the contents of the files that you brought with you with him?

A I was.

Q Why didn't you discuss those cases with him?

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A I never had the opportunity to. The interview was terminated before I could get into them.

Q Wnen did you receive your GS-12?

A February, 1970.

Q How did you come to receive it?

A We had a point score card promotion plan, that if you got so many points you won the prize, and I received so many points that he said I was a 12.

MR. ADAMS: Your Honor, I move to strike that answer on the same grounds as this morning.

THE COURT: Strike it out.

MR. ROTHSTEIN: I have no further questions.

THE COURT: Any cross-examination?

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Honan, you testified that you appealed your classification to the Civil Service Commision. Was that in 1966 when you initiated your appeal?

A I believe it was.

Q Did you appeal with a group of 50 or so investivators?

A Yes, I did. There were a number of investigators.

Q Did you receive a letter from the Civil Service

Commission after your interview with Mr. Friedman telling you which way your appeal had gone?

A Yes, I did.

Q Which way did your appeal go?

A It was denied.

Q And did you take any further steps after that?

A I personally? No.

Q Did you know that other investigators asked the Washington office for a review of the regional office's decision?

A I don't recall. I donpt think so, though.

Q But you did not?

A I did not.

Q How many case files did you bring with you, Mr. Honan?

A Between seven and ten, I would say.

Q Mr. Friedman looked at one of those files; is that correct?

A That's correct.

Q What did those files consist of?

A The files consisted of reports that I had prepared, memorandums and outlines of the date it first came to our attention up to the present time.

Q This would be your own words in these reports

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S A M U E L H. Z U T T Y, called as a witness on behalf of plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Your address, sir?

THE WITNESS: 10 Embassy Court, Great Neck, New York.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Zutty, what is your occupation?

A I am a criminal investigator with the U. S. Immigration Service.

Q What is your current grade and assignment?

A Presently Grade 13. I am in charge of a project involving reported Nazi war criminals in the United States.

Q Mr. Zutty, will you briefly outline the positions that you have held in the Immigration and Naturalization Service?

A I started in 1951 as Grade 7. After some years I became a Grade 9. About 1960 or 1961 I became 11. In 1967 I was a 12, and in 1974 I became a Grade 13.

Q Mr. Zutty, at the time you became a GS-11 investigator through 1967, would you describe to the Court generally the kinds of cases you were working on?

A I worked on cases involving highly sensitive matters involving national security, cases where individuals were charged with placing of bombs, sabotage, criminal cases, involving denaturalization cases, revocation, deportation and the like.

Q During this period of time, who your supervisor?

A My supervisor was Max Weinman who was in charge of the subversive section. As a matter of fact, my entire career, other than the first two years with the Service, was in the subversive section.

Q What was Mr. Weinman's role as your supervisor? What did he do with respect to your cases?

A In every case that Mr. Weinman was involved in, his only function was to review my reports to see whether they fulfilled the qualifications set forth as a complete and conscientious job.

Q What was the role of the subversive section during the period that you were assigned to that section?

A The subversive section was part of the special investigations section and was involved with cases that dealt with allegations of subversive activities, of involvement in matters of terrorism, bombings. There is a whole classification of cases which are specified within the subversive section and are handled by members of this

squad.

Q From 1961 until 1967, during that period were you familiar with cases that were assigned to other members of the subversive section?

A Yes, because all cases -- and I say this strongly -- all cases in the subversive section were identical -- the case load that the investigators in the subversive section had were identical in nature. The supervisor, Mr. Weinman, handed the cases out on the basis of carrying a normal case load.

In other words, if you needed a case or two, you got them. There was no selection as such that one man would get a hard case and another man would get an easy case, or any type of determination in that manner.

Q In 1966, sir, you appealed your classification of GS-11 to the Civil Service Commission, requesting that you be placed in the class of GS-12; is that correct?

A That's correct.

Q At that time did You believe that you were working on GS-12 work for a majority of your time?

A Well, I was quite sure, and it was more or less pointed out very obviously that I was doing Grade 12 because the identical -- the men who were in the same squad as I who were doing the identical work were deter-

mined to be Grade 12. If I was doing the same work that they were doing, I by definition was doing Grade 12 work.

Q Can you give some examples, without using the names of individuals, of the kinds of cases you were carrying in 1966 and a year prior thereto?

A I could specifically recall because I just reviewed them. There was a case of a man accused of sending threatening letters to President -- to the President, and admittedly that he was involved in the assination of President Kennedy. His case was in my jurisdiction, and I handled the matter in that respect.

There were other cases where a subversive allegation of this man was involved with anti-American activities and pro-Castro -- was a member of pro-Castro organizations. His activities were the placing of bombs and other types of terroristic activities.

Q After the filing of your appeal, sir, were you interviewed by any representative of the United States Civil Service Commission?

A Yes, I was.

Q By whom were you audited or by whom were you interviewed?

A I can't recall his name. I do know that I made the appeal and subsequently I was interviewed by a

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representative of the Civil Service Commission.

Q How long did this interview take?

A No more than 15 minutes. Possibly less.

THE COURT: What date was the interview?

THE WITNESS: May I consult my notes?

THE COURT: Yes.

THE WITNESS: It probably --

THE COURT: Not "probably". When was it?

THE WITNESS: I can't say for sure what day it was.

THE COURT: How can you say with equal assurance that it was only 15 minutes if you can't even tell the date?

THE WITNESS: The reason for that, if I might add, after the interview and subsequently I was informed by the Civil Service Commission that my appeal was denied, I then submitted a letter to the Civil Service Commission appealing the decision, and in that, dated 1967, I pointed out that no more than 15 minutes was spent during the interview, and I felt that with this short and cursory examination by the Civil Service representative it was impossible for it to be determined that I was doing Grade 12 work, and no files were being -- as a matter of fact, because I --

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THE COURT: What percentage of your work was Grade 12?

THE WITNESS: 75 per cent.

THE COURT: How did you fix that?

THE WITNESS: That was the determination that after my original appeal was -- after the Civil Service Commission reprentative interviewed me and subsequently, I was informed that my grade was correct, I wrote an appeal, and then I was sent a letter saying they would like -- a Mr. Van Tassel, I belive, came in and asked that I submit a breakdown of the cases I was carrying and how many hours I spent on them, which I then did.

By determining how many hours I spent on each case, I was able to figure out that during this period of time I spent roughly -- not roughly, approximately 75 per cent of my time doing Grade 12 work by nature of the investigations involved.

Q Would you describe exactly what took place in the initial interview you had with a representative of the Commission?

A I was called into one of the hearing rooms where I sat down with the gentleman. In a very short -- as I say, the whole interview lasted 15 minutes, he asked me what type of work I was doing. I said I was in the

subversive section doing the normal investigations which are conducted by our section.

He asked me what other type of work I did during this period of time. I said I was also assigned to a project with the Attorney General on organized crime for a short period. In 15 minutes there was no case discussed, I mean individual case discussed. There was merely a fast review of what type of work I was doing and the general description set forth.

Q Did he ask you how much time you were spending on any particular cases?

A No, not to my knowledge.

Q Were files available there for you to show to him?

A My files were of course available, but I have no recollection whatsoever bringing any files in nor do I recall him looking at them at any other time.

Q Do you know whether Mr. Weinman, your supervisor, spoke with the Civil Service Commission representative?

A It is my recollection that he did.

Q Did you hear any such conversation personally?

A I believe I heard him say to the Civil Service representative that all the men in my squad are doing by

and large essentially the same work.

Q When you say you believe you heard him say that, for the record, Mr. Zutty, would you state where the speakers were standing or sitting at the time you heard it?

A Well, we have a very peculiar office in the sense that everything is closely bound together. There are little cubicles, and the supervisor and the Civil Service representative was in one of the cubicles and I was in the next cubicle, and you couldn't help but overhear the general conversation.

I think Mr. Weinman himself told me that he told this to the Civil Service Commission at a subsequent time to put himself in our good graces.

Q What was the result on your appeal that you had made in 1966?

A Well, after -- I then set forth a description of the type of work I was doing on the cases, how many hours on each case, sent the whole report in to the Civil Service Commission --

Q Was this before or after the initial decision?

A This was after the initial decision.

Q What was the original decision?

A The original decision was that I -- that the appeal for a Grade 12 was denied.

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Q What happened subsequent to your receipt of the denial on your initial appeal?

A After my initial -- after I was denied, I submitted another letter appealing it, and then they sent me back a memorandum saying that to assist him in evaluating my appeal, to submit a breakdown of the cases that I worked on, which I did.

I sent them approximately a review of 30 some-odd cases, how much time I spent on them and the nature of the investigation. Then I submitted that all in, and subsequently on June 9, 1967 the Civil Service Commission informed me that they reviewed my appeal and feel that my position does warrant classification to GS-12.

Q When were you finally promoted to GS-12?

A I would say -- offhand I guess about July, 1967.

Q Mr. Zutty, from the time you became a GS-11 investigator in 1961 until the time you were promoted to GS-12 in 1967, based on your successful classification appeal, in your opinion was there any change in the level of cases which were assigned to you?

A Absolutely not.

MR. ROTHSTEIN: I have no further questions, your Honor.

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here were all New York investigators, weren't they?

THE WITNESS: That is correct.

THE COURT: The New York rule was a majority of your time?

THE WITNESS: Right. The Civil Service Commission said in New York you have to do it the majority of the time.

THE COURT: That always had been the New York rule, hadn't it?

THE WITNESS: No, it hadn't, your Honor.

THE COURT: When did it change?

THE WITNESS: At the inception of these appeals.

THE COURT: Was anybody given a grade prior to 1966 that was increased without a finding of a majority of his time being in the upper grade?

THE WITNESS: I shall answer that sort of with hearsay. The District Director in New York, Mr. P. A. Esperdy, told me that as long as he had been in the Government for 25 years he had seen Civil Service Appeals and adjudged only with the substantial rule as he knew it.

THE COURT: Was he in New York?

THE WITNESS: Yes, sir. He was our District Director. The question, the unfairness of it, he was upset because when he found out in 1967 --

that it is, this is not a change.

THE COURT: What Mr. Rothstein is reaching for through this witness' testimony is what happened prior to the time that this group of plaintiffs appealed. This witness can't say of his own knowledge, and I leave it at that point. If there is any testimony on the subject from another competent witness, I will listen to it.

MR. ROTHSTEIN: I note, your Honor, that this is one of the prime purposes that I indicated earlier than plaintiffs would be calling Mr. Friedman as a hostile witness.

THE COURT: I am not shutting you off from that. I am merely saying that the way the record stands at the present time, this was the rule that was applied, and there is no indication of any other rule to be applied at the time. Certainly no regulation on the subject.

MR. ROTHSTEIN: There is an exception to the majority rule which --

THE COURT: I know about the exception. I read it. But ghat exception is not the one that we are administering in this case.

THE WITNESS: Your Honor, this letter I have in my hand written by me in 1968, in the third paragraph,

A Mr. Gil Schulkind's letter to Mr. John Griner, the president of the union, after we had the conference in Washington. I testified to that fact.

Q That a 10 or 15 per cent standard was used by the Civil Service Commission?

A That the Civil Service Commission would approve an agency using it. The Civil Service Commission in each instance approves examiner work on each -- each agency can do their own classification.

MR. ROTHSTEIN: I object to this.

THE COURT: It is perfectly clear to me that the questions and the answers are not meeting on common ground. If there is an exhibit, you will find it and call it to my attention.

MR. ROTHSTEIN: I think the record will speak for itself on Mr. Kavazanjian's testimony of last Thursday.

Q Mr. Kavazanjian, one more point. I want to turn to page 2 of Exhibit HH. That's a letter identified previously as being signed by you; is that correct?

A That is my signature. I wrote this letter.

Q I want to read a sentence there. The second to last sentence:

"The INS achieves more balance to the office by preventing the overspecialization of the special

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investigation and fraud units, where heretofore all the GS-12 work has been funneled."

A Continue.

Q "And buried for lack of GS-12 personnel."

A Correct.

Q This letter was written on December 7, 1968; is that correct?

A That's correct.

Q At that time you were saying that there is no GS-12 work in the general unit, is that correct?

A No, no. The idea of the letter, I am saying, is that there was -- they found these percentages of GS-12 --

Q Primarily the GS-12 work had been funneled out of the general investigations unit, in your opinion?

A What happened was as soon as the case developed in a certain area they would take the work away and send it to another area, but only to prevent the man from moving up in grade. Not for any inability to perform our mission.

Q It wouldn't be because a fraud had been discovered and it ought to go to the frauds unit, could it?

A It could have been. It also could have been to take the work away. My opinion was it was deliberate. It was inflicting -- it was cumbersome. A case originated

JACK RICCIARDI, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Ricciardi, what is your occupation?

A Supervisor Criminal Investigator, United States Immigration Service.

Q What grade are you at now?

A GS-14.

Q Would you please briefly outline the various positions which you have held with the Immigration Service and the grades which have been assigned to you under the Federal Service System?

A Starting when, sir?

Q Well, as far back as you can recall.

A Well, 1951 I come into the Service as a boards patrolman as a GS-6. Upon completion of a satisfactory probationary period, promoted to GS-7. Still in the boards patrol. Subsequently assigned to investigations, New York City, in approximately 1953. Remained in that position as a GS-7 for approximately a year, year and a half. Remained a GS-9 until about 1961. Got a GS-11 and then in approximately, well, in June of 1967, was reclassified to a GS-12.

Q During the period that you were an investigator in New York, can you state whether or not any supervisory investigators ever went out into the field in order to perform actual investigations?

A No, sir. I never recall an instance where they went out in the field.

Q Mr. Ricciardi, I would like you to take a look at P. 27 in evidence-- I am going to show my copy -- and I ask you to look at the listing of investigators on the bottom after the word "New York" in which the name Jack J. Ricciardi followed by "GS-11 76 percent" appears, and I ask you if you know whether or not that name relates to you, whether that in fact is you.

MR. ADAMS: I would concede, your Honor, that that is Ricciardi.

A Yes, sir.

Q And do you know whether or not you were in fact audited by the Immigration Service between January of 1966 and March of 1967 in order to determine whether or not you were working on GS-12 level cases?

A What period did you say?

Q The period would be January of '66 through March of '67 -- strike that.

A I'm sorry. I misunderstood the question.

I don't know when they did the audit. I believe it was sometime at the end of 1966. But I do recall Mr. Augustino, who is our regional commissioner of investigations, was down here and he carried my case load into a room and they were reviewed. I assume they were reviewed.

Q Now, in 1966 you filed a classification appeal with the Civil Service Commission, is that correct?

A Yes, sir.

Q And you were at that time a GS-11 and you wanted to be classified as GS-12.

A Yes, sir.

Q In connection with that appeal, were you interviewed by any representative of the Civil Service Commission?

A Yes, I was. By a Mr. Friedman from the Civil Service Commission.

Q Will you describe what transpired at this interview?

A He come in to see me and I was sitting at the supervisor's desk at the time, and he interviewed me right at the desk.

Q Did he look at any of your files?

A I don't recall him looking at any of the files. He was interested in what the subject matter of

the files related to. And I sort of furnished him what an oral presentation as to what the files involved.

Q Did he take any notes?

A Yes, he did.

Q Did he make any statement to you, sir, about your probability of success on your appeal at that time?

A Yes, he did. Approximately two hours of interview he got up, shook hands with me and advised me that -- I don't recall his exact words, but it went something like -- "I don't believe you'll have any trouble."

I didn't ask him what he meant by that or didn't inquire later on what he meant by that.

Q Did you subsequently receive a decision letter in February of 1967?

A Yes, I did.

Q And what was the decision that you received?

A My GS-12 reclassification appeal was denied.

Q Subsequent to receipt of this letter --

THE COURT: Would you be good enough to tell me how February 1967 is subsequent to March of 1967?

MR. ROTHSTEIN: March of '67, I believe, was the audit by the Immigration Service. The audit by Mr. Friedman, which I will establish through the witness --

Q Did you subsequently appeal to the Bureau of Inspections of the Commission in Washington?

A Subsequently? I thought I sent the letters out at the same time.

Q When I say subsequently, I mean subsequent to the denial of your initial appeal.

A Yes, sir.

Q And what was the result of that appeal?

A The second request?

Q The appeal from the initial denial.

A I never heard anything further from the Civil Service Commission. But in the middle of June 1967 I was reclassified to a GS-12.

Q When you say that you never heard anything further from the Commission, I ask you whether or not you remember receiving any letter from the Commission granting your appeal.

A Oh, yes. There was a short letter. Exactly what it said at this point in time I don't recall.

Q Throughout the period from 1966, when you filed your appeal, until you actually received your promotion to GS-12, was there any change in the kind of work you were doing or the kinds of cases which were assigned to you?

A No, sir.

MR. ROTHSTEIN: I have no further questions on direct, your Honor.

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Ricciardi, you testified you appealed to the Civil Service Commission in 1966. Was this with a group of other investigators in the New York District?

A Yes, it was.

Q Prior to that appeal, had you appealed your GS-11 classification?

A No, sir.

MR. ADAMS: We have no further questions, your Honor.

THE COURT: Thank you. You may step down.

(Witness excused)

MR. ROTHSTEIN: At this time, your Honor, the plairtiffs would like to call Mr. Samuel Friedman.

MR. ADAMS: Your Honor, Mr. Friedman is scheduled to be a witness for the defendants.

THE COURT: He can call him, if he wants to.

MR. ADAMS: We can either do it by my calling him now, without resting the plaintiffs' case, or by having the plaintiffs call him.

MR. ROTHSTEIN: We respectfully request the right to call this man.

THE COURT: Go ahead, would you, please?

S A M U E L F R I E D M A N , called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. ROTHSTEIN: Your Honor, before I begin my questioning of Mr. Friedman, I would respectfully request a ruling from the Court that Mr. Friedman --

THE COURT: Please go ahead, will you? This is a non-jury case and we don't go through all that commotion. Just ask your questions in the way you think you should ask them.

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Friedman, what is your occupation?

A I am a management consultant and specializing in job classification.

Q And are you currently a consultant to the Civil Service Commission and/or other government agencies?

A Yes.

Q Will you describe what agencies you served as a consultant to?

A I've done work, since my retirement in 1970, for the British Government, the Swedish Government and some federal agencies, including the U.S. Department of Agriculture, the United States Customs Court, the Department of Health, Education and Wefare, the Department of Housing and Urban Development, the State of New Jersey and the Civil Service Commission.

Q And has all of that work been in the field of Civil Service law?

A Not Civil Service law but job classification and personal management.

Q What positions did you hold with the Civil Service Commission during your career there and at what grades?

A When I retired, I was a personal management specialist, grading GS-13, and I had been a personal management specialist at various grades for most of my career in the federal service, which would be about twenty-seven years with the Civil Service Commission plus an additional three years with other federal agencies.

Q What position did you hold with the Civil Service Commission in the period 1966 through 1969?

A Well, I was a personal management specialist and my role was to adjudicate the classification appeals submitted by Federal employees in the New York Region.

Q And which bureau division of the commission were you assigned to?

A Well, let's see, we had some recordings. It was called then, I believe, the Division of Personnel Management.

Q Specifically, Mr. Friedman, what was your function with regard to the fifty-two or some odd Immigration Service investigators who appealed to the Commission in 1966?

A My job, and I spent more than half of my time on job classification, and as such I had the responsibility for adjudicating the classification appeals.

Q As a matter of fact, Mr. Friedman, would it be fair to say that you were actually running the show as far as those appeals were concerned?

A Yes, that is a fair assumption.

Q You were making all the key decisions with regard to how the appeals would be handled?

A That's right.

Q When did these appeals first cross your desk, sir?

A Well, I believe they came into our office in May of '66 and I would have gotten them the same day or the next day, when they arrived into our office.

Q They crossed your desk?

A Yes, they did.

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Q Let me ask you sir, what is the function of the Civil Service Commission, the function which you exercised in handling appeals of this nature?

A Well, as you may know, there are roughly about a million federal positions that are classified under a federal classification system, and this system was established by Classification Act of 1949. One of the provisions of that act is to give the employees who are under this act the right to appeal their classification, and this appeal then has to come to the Civil Service Commission, which has to give a decision on the appeal.

Q Is it a fair statement that the Commission is to act as a impartial arbitrator when such appeals are received?

A Absolutely.

Q Is it correct to say that the agency and the appealing employees are, in effect, litigants before the Civil Service Commission which is making the decision?

A I suppose you might make that assumption, yes.

Q Would you also say, sir, that the prime function of the Commission in such appeals is to assure that Civil Service employees receive equal pay for equal work?

A Yes, sir.

Q I ask you, Mr. Friedman, whether the agency's budgetary limitations or considerations of the agency's

budget are proper considerations for the Commission to take into account in deciding classification appeals.

A No, sir.

Q Why not?

A Well, we, when we classify a position, we do it by considering the duties of the position, the responsibilities of the position, and the qualifications that are required to carry out those duties and those responsibilities, and nothing else.

Q So the fact then that an agency's budget might be strained, that they wouldn't have the money to pay, would be totally irrelevant to your consideration?

A That's right.

Q When you received these appeals in 1952 -- strike that.

Would you consider the fifty-two appeals which you received in 1966, to be an unusually large group of appeals from a single agency in a single time?

A Yes, sir.

Q Had you ever seen one that large before?

A No.

Q This was the first time that you had seen such a large number at the same time?

A Yes, sir.

Q Had you had any experience in the field of classification within the Immigration Service prior to receiving these appeals?

A Some experience. We had had some individual appeals from the Immigration Service as we did from other agencies.

Q Did you have any particular expertise in this field of Immigration?

A Well, I'm not sure what you mean.

MR. ADAMS: May we have that question clarified a little bit?

MR. ROTHSTEIN: I'm merely establishing the witness' qualifications in the field of Immigration. If he feels in his opinion he had such special qualifications he can so explain.

THE COURT: He claims to be a personnel and management specialist.

MR. ROTHSTEIN: I'm referring to --

THE COURT: And he said that he had some exposure to Immigration appeals.

MR. ROTHSTEIN: I will ask the witness then to characterize the exposure as to whether or not he considered it to be substantial exposure.

THE COURT: You mean twenty-five percent of his

time?

MR. ROTHSTEIN: I will let him characterize it.

A No, we received many appeals, and I'm sure of those some were from the Immigration Service. I couldn't give you any figures at this point. This would be the extent of my exposure to the Immigration Service, plus I might add something else, the other partof my time, other than the classification appeals adjudication work was concerned with inspection, inspection of federal agencies, inspecting their personnel management, and we would inspect the Immigration Service as just another federal agency, so I had exposure in that sense to the work of the Immigration Service.

And we made a few, that is, I made one or two inspections of that agency over the years.

Q What previous experience had you had in classifying the trades of investigators in federal service?

A Well, the only experience I would have had as such would have been in connection with individual appeals which may have come in, and I can't recall exactly how many or what we had, but I'm sure we had a few appeals from individual investigators over the years which I had to adjudicate.

Q Would it be a fair statement that the field or the area of the individuals of investigators within the Civil Service Commission was a relatively new field to you?

A No, sir.

Q But it was not a field in which you had had any substantial degree of experience?

A Well, you have to appreciate what a classifier's job is, what a personnel management specialist's job is.

He is not an expert in any particular occupational field. He doesn't have to be. But he is an expert in being able to secure the facts about a position, any kind of position, any occupation, being able to analyze those facts and relate them to what is pertinent in the classification sense, and then to compare those facts against the criteria and the standards for that occupation and then to arrive at an evaluation, and of course this is a matter of judgment, of interpretation.

So we are not experts. We cannot go out and do the chemist's job or be a doctor or be an investigator -- I suppose we could be an investigator, but there are other fields where we couldn't take on the role or the incumbence of those occupations, but we can understand enough about the occupation so we can appreciate the difference in relative complexity of the work that is being done in that occupation, and this is true of the investigator.

Q You sort of had to learn about the job as you went along, as you got into it, in order to make your determination?

A Well, not really, because a classifier, again,

I have to go back to my own experiences, a classifier is an investigator in a sense too, because he is getting the facts about the position, he is analyzing those facts and he is coming to an evaluation.

So there is agreat similarity between the work of an investigator, any type investigator, and a classifier.

Q When you received these appeals, did you determine in advance any plan of operation or way of handling them?

A You mean after I received the appeals?

Q After you received the appeals, when they crossed your desk, you were now confronted with the largest appeal you had ever had. I'm asking if you determined any plan of operation, any scheme of conducting these appeals, and I use "scheme" in the sense of a plan, modus operandi, a way of proceeding.

A We had a problem. It was a large group, a heavy work load. And our first impression was to treat it as a group, because we had had other groups, not that large, and what we do with a group usually, we make arrangements to interview one or two or some number of the appellants, and these we feel are representative of the group, and we come to a decision for the group.

But in this case we had so many, and after reading the standards, I made a preliminary look at the standards for

investigators, and of course the criteria and the standards are such that the grade depends upon the assignments, the nature of the cases given, so we couldn't treat that as a group because we had to come to a decision in each of the appellants based on the cases assigned to that appellant, so we then changed our approach and treated the group as a series or a large number of individual appeals.

We sort of converted them to individual appeals.

Q Did you determine, sir, that it was essential to desk audit each appellant?

A Yes.

Q Why did you determine that it was necessary to do that?

A Well, since the only way we could arrive at a decision would be to examine the cases assigned to each appellant, we had to talk with them, we had to examine the cases and see the nature of the cases, and then come to a conclusion, to a judgment on the value of those cases.

Q Did you determine how much time it would be necessary to spend with each man in order to accomplish this?

A No. This is never set out in advance. We never do. Some take longer, some take a shorter time.

Q You say a longer or shorter. What would you say would be the minimum amount of time that you would have to

spend with a man in order to derive all of this information from him?

A Well, there is no firm rule.

THE COURT: The first man or the fifty-fourth man.

MR. ROTHSTEIN: I think the witness can answer. If there is a difficulty he can tell us, if not, he can also tell us.

A We have no -- let me say -- I had no way of knowing at that point how much time I would need for each interview and the time would depend upon the individual, the nature of the cases, and how much exploration I had to make to get more information from each of the appellants.

So there was no set time set, and we never set time for audits in advance. We never do.

Q Mr. Friedman, do you remember speaking to me in my office in the presence of Mr. Adams, the Assistant United States Attorney on June 2, 1975, and telling me that you had determined that you would want to see one in the morning or one or two in the afternoon of each day because it would take that much time in order for you to speak with them and get the information which you wanted to get. Substantially is this what you told me at that time?

A Yes, sir. I was allowing that time in case I

needed it, right.

Q You say you were allowing this time?

A If I needed the whole morning, it was there, I wouldn't have to interrupt this interview to go to another one, so I allowed the morning without knowing in advance whether I needed the three or four hours that morning or for the afternoon.

Q Did you also tell me, Mr. Friedman, that the reason it took so much time to reach the ultimate decision which didn't come until February of '67 was the need to see each appellant for several hours and the number of days that it would take to do so?

A I think that is correct.

Q You made that statement in my office to me on June 2, 1975?

A Yes, all right, that is correct.

THE COURT: I think it would be much better if you didn't put yourself into the case by just asking the witness what the fact is, because if you find that there is some variation, I take it you will not be in a position to take the witness stand because if you were to attempt that, you would have to relinquish your role as the lawyer.

MR. ROTHSTEIN: I have no intention of testifying.

THE COURT: So the more efficient and the more

lawyer-like way of proceeding would be to ask what the fact is, rather than whether the witness told you something.

What he told you is of little consequence unless you are preparing yourself to be a witness.

MR. ROTHSTEIN: I think the witness has admitted or stated that --

THE COURT: I understand that. I am merely telling you about the technique of the proper approach so that you don't disqualify yourself along the road.

MR. ROTHSTEIN: Thank you, your Honor.

Q Mr. Friedman, will you explain what you believed it was necessary to ask each appellant in the course of the desk interview what it was necessary to do with regard to his files during this interview?

A Yes. Before I could arrive at any evaluation of the position of the appellants, I would have had to get information about the nature of the cases assigned and the kind of supervision received by the appellants, and in connection with the types of cases assigned, I would have to know the time spent on those cases.

Q Would it be necessary for you to review files?

A Only if I thought so. In most of these cases, yes.

Q You say in most of the cases it would be

necessary?

A Yes.

Q Why would it be necessary to review files, sir?

A So as to get some more specific facts about the nature of the cases, what was involved in the cases.

Q Would the files also enable you to make a determination of how much time was spent on a particular matter by the employee involved?

A The files themselves, no.

Q Well, for instance, if you were to see ten memoranda of telephone calls in there of substantial length, wouldn't this be a good indication to you that a lot of time had been spent on it?

A No, it might not, because I wouldn't have any way of knowing the length of the telephone calls, and I don't think they would of a number of telephone calls listed in a case file. I would have to have more specific information about when the case was assigned, when the case was completed, and a good approximation from the appellants as to how much of his time during the year he spent on those cases because they all had a work load of more than one case.

Q What about memoranda in the file, memoranda to the file written by the employee? Wouldn't the length and complexity of these memoranda be an indication to you of how much time was being spent by an employee in a particular case?

A Here again it might and it might not. Some people can write a long memorandum very quickly. Others might take longer. So I really couldn't conclude from that information about the time span. I would have to have more specifics.

Q Did you speak with supervisors regarding the amount of time that employees were spending on particular cases?

A Not about time. I spoke to the supervisor about the assignments that were given and the nature of the supervision that was being exercised over the appellants.

Q Did the employees indicate to you how much time they were spending on particular cases?

A Yes. In response to my questions they gave me the information that I asked for.

Q Did you accept as absolutely true the time estimates which were made by the employees?

A Well, they had to show me a little more than that. They had to show me some written data.

Each of them kept a diary of their assignments. So I used that as a basic source of information.

Q Mr. Friedman, what is meant in Civil Service parlance by the term "mixed grade position"?

A Well, this means a position that has in it a mixture of duties. Some of the ditues may be one grade and others may be of a different grade. So you get a combination of assignments which are evaluated at different grades in the same position.

That means a position is a set of duties and responsibilities assigned to one individual.

Q Did you consider the Immigration Service GS-11 investigators who were appealing to be in a mixed grade position?

A Yes, sir.

Q And why did you make that determination?

A Because they had assignments of cases of varying grade value. Some were, let's say, 12, 11, 9. So there was a mixture there of different grades.

Q In a mixed grade position, Mr. Friedman, what percentage of time is it necessary that an employee be spending on the higher grade level in order to justify his promotion, on a classification appeal, to the higher grade?

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A The general rule is, the majority time, 51 percent or more.

Q When you say "the general rule," what are you referring to?

A Well, this is the rule set forth by the Civil Service Commission in its classification procedures, policies. In such a mixture you classify it to that duty which occupies a majority of the employee's time.

Q When you say it is a rule, do you know that this rule was ever published in the Federal Register?

A No, I don't. I couldn't say if it was or not.

Q Where is the rule contained? Where do you refer to when you want toread the rule and see what it says?

A Well, it is in the introduction -- the Commission puts out the classification standards, which would control the classification of positions. Now, in the introduction to the classification standards there is one chapter on mixed grade positions.

Also, the Commission puts out a pamphlet on, I think they call it, classification policy, and in there there is a section on mixed grade positions.

Q I show you DX H, which is a publication by the

Commission entitled "Position Classification Standards," and I ask you if this is noe of the documents you are referring to which outlines the Commission's rules.

A Yes. This is the introduction to the classific-tion standards.

Q And at the time you made the determination regarding the majority time, did you consider this rule to be absolutely binding on you?

A Yes, sir.

Q Sir, I would like to read to you and then show to you Page 25 of Exhibit H, in which the statement appears "Only general guides can be offered because of the fact that mixed grade positions occur under so many different circumstances."

I would like you to read that and the paragraphs following it and then I am going to ask you a question.

(Handing)

(Pause)

A Yes. The next sentence says that "In classifying the great majority of positions, the principal duties and responsibilities will govern, that is, those that take up at least a majority of the employee's working time."

Q I ask you, sir, in view of the sentence which precedes that, to the effect that only general guides can

be offered, why you considered yourself to be absolutely bound by the majority of time rule in making you determination.

THE COURT: Is the majority time rule anything more than a general statement? Majority can be 49.9 percent of the time, can't it?

MR. ROTHSTEIN: I'm sorry?

THE COURT: I say a majority can be 49.9 percent of the time. And therefore to refer to something as a majority is to refer to it only generally. You don't know whether you are referring to 50.1 or 56 or 97.

BY MR. ROTHSTEIN:

Q Mr Friedman, would you define the term "majority time rule" as you understand it and as you applied it in connection with your appeal?

A Yes, sir. The general rule that we applied, and this is what we were reading a minute ago, speaks in terms of the majority as being more than half, 51 percent.

Q In other words, a mathematical formula, 51 percent or more.

A For that determination, yes.

Q And you felt that you were obliged to apply the majority time rule, is that correct?

A Yes, sir. I have no basis for following other

than the Commission's guidelines, the Commission's principles.

Q Sir, would you define the term "substantial time rule"?

A "Substantial," in the classification sense, is defines as being 25 percent or more.

Q And when you say "25 percent or more," do you mean that in certain circumstances employees performing level work in a mixed grade position for 25 percent or more of their time may be classified as the higher grade upon their request for reclassification?

A This is another point you are asking me now. If you ask me the definition of "substantial," I gave that to you as 25 percent. If you are asking me whether there are exceptions to the majority time rule in terms of substantial, the answer would be yes.

Q Do you know whether the Commission has formalized the substantial time rule?

A Well, only in that about a sentence or two beyond what we read before on that same page it talks about the exceptions, and there are situations where you may classify a mixed grade position on the basis of those duties which take less than a majority of time.

Q And what are those circumstances as outlined

in the rule? And I can show you Exhibit H, page 26 (Handing).

Referring to that, would you explain where those exceptions apply?

(Pause)

A Yes. Perhaps I can give you an examine which would illustrate it.

If you have a small office and there is one employee there who is assigned a variety of duties of different grade values, and of course this makes it a mixed grade position, you could classify her to the highest grade duty which that person performs even though it was only a substantial amount of time, becuase there was no one else in that office to carry out those higher grade duties.

And if they could not be perfcrmed, that office would be handicapped and couldn't perform its function. So it is a perfectly proper exception in that sort of a situation.

Q I ask you, sir, to look again at page 26 of Exhibit H and I ask you whether or not the Commission has made any reference to small offices in outlining the criteria for applying the substantial time rule.

A No, it doesn't talk about a small office. But it talks --

Q What criteria are present, then?

A It says "Duties and responsibilities are paramount in influence or weight that occup a substantial portion of the employee's working time."

The phrase "paramount in influence or weight" means that they are so important to the function of that office that, without recognizing the qualifications of the employee to perform those functions and without classifying at the higher grade so as to have that employee available for those assignments, those duties, the office would be handicapped.

So paramount means in terms of what you need to have done to carry the work of that office, first; secondly, the qualifications that you would look for in an employee to carry out that position.

The assumption is that, if you have an employee with higher skills, higher qualifications, he could do the higher grade work as well as the lower grade work. But, on the other hand, if you don't recognize the qualifications and you don't get someone with those higher qualifications, you have no assurance that that employee can perform the higher grade work as well as the lower grade work.

Q Now, Mr. Friedman, isn't it correct that as the classifier handling the appeals it was your obligation

to make a determination as to whether or not the majority or the substantial time rule should be applied?

A Yes.

Q And isn't it also true that such obligation should be based on your actual observations of the employees and of their agency?

A Yes.

Q I ask you then, sir, why, as you have testified, you made a determination that the majority time rule would be applied in advance of your speaking with all of the employees who had appealed and in advance of completion of your reivew of the mission of the agency and the functions of the employees as they related to the mixxion of the agency.

A Well, you are asking me to go through the thinking process in the classification. I didn't come to a conclusion about the appeals,about the cases. I came to a general conclusion that the majority rule would be applicable in the absence of any information at that point which would indicate that it would not be applicable.

This did not mean, if circumstances were such or if the facts were such later, where there was a proper use of the exceptions, that this would not be used.

Q So that is it fair to say that you approached the agency with an open mind and that based on what you

found you would determine after your investigation whether or not to apply the majority time concept or the substantial time concept?

A Yes.

Q Mr. Friedman, with regard to the substantial time rule, are you aware of the use of that rule by agencies other than the Immigration Service in classifying their emplcyees?

A Yes.

Q Would you list some of the agencies which you know apply this substantial time rule in mixed grade positions?

A Well, it is used to some degree or other, more or less I might say, by almost all the federal agencies.

Q Could you give me some specific examples, that you are aware of, of other agencies using the substantial time rule in mixed grade positions?

A The Veterans Administration, the Department of Health, Education and Welfare, the Internal Revenue Service. I'm just giving you some agencies.

Q Do you know if the Post Office was using it about the time you made your audits?

A Well, the Post Office was not under the classification system, what I'm talking about. They had their own classification system. So it wouldn't be appropriate.

Q What about wage and hour investigators?

A They did, yes. They used the substantial rule.

Q What is meant by the term "coordinated federal wage system"?

A This is a classification system that applies to the blue collar occupations, and they are paid on a wage rate, an hourly rate. It is a system that is used by agencies which have blue collar employees and the system is coordinated, controlled, directed, supervised by the Civil Service Commission.

Q Do you know if the substantial time rule in mixed grade positions is applied in the coordinated federal wage system?

MR. ADAMS: Your Honor, I am going to object to that question. We are getting outside of the classified employees under the classification system.

THE COURT: Sustained.

Q Mr. Friedman, do you know whether the Immigration Service adopted this substantial time rule for classifying its investigators in areas outside of New York?

A They did.

Q Do you know which areas?

A I believe they did so out on the West Coast.

I couldn't tell you which office.

Q Do you know if it was adopted as a rigid 25 percent rule, 25 percent or more, or whether it was a more flexible concept?

A I couldn't tell you that. I don't know.

Q Well, is the substantial time rule always a rigid, inflexible 25 percent or car an employee with, say, 20 percent or 22 percent be promoted to be doing that high caliber, higher grade work in a mixed grade position?

A The answer is the substantial rule, again, is not a rigid rule. There are variations, a little below 25 percent.

Q So is it correct to say that the majority time rule is a rigid rule, 51 percent or more, where the substantial time rule is a much more flexible concept?

A Yes.

Q Now, you mentioned the West Coast. I ask you, sir, whether or not the use of the divergent standards in New York and on the West Coast created a situation where investigators who were doing exactly the same work received different grades and different compensations.

MR. ADAMS: I object to that question, your Honor. Mr. Friedman has no knowledge as to what the work people were doing on the West Coast.

THE COURT: The witness is the best one to say for that. But there is no predicate for the question. That is the proper objection. It is not a proper objection that the witness doesn't know, because he hasn't been asked. But there is no predicate for the question as yet, so the objection is sustained.

i take

MR. ROTHSTEIN: Your Honor, I will ask the question as a hypothetical. I believe the man is an expert.

Q Assuming that the substantial time rule is applied in one area of the country, in one district, to investigators, and the majority time rule is applied in others, is it not possible that employees doing exactly the same level or work will receive different levels of pay?

A That is correct.

THE COURT: Of course you are assuming that the conditions are the same, which you haven't mentioned in your question.

Q Well, assuming that the conditions are the same.

MR. ROTHSTEIN: I think the witness assumed that in his answer.

THE COURT: You think he did. You are testifying, if you say you think he did. I don't know.

MR. ROTHSTEIN: I will rephrase the question.

THE COURT: I suppose down on the Mexican border, dealing with wetbacks, you have slightly different conditions than you have at Kennedy Airport, I'm not sure. I have never been to Brownsville, so I can't say. But I have a suspicion that the conditions are slightly different.

MR. ROTHSTEIN: Except, your Honor, that there is testimony from Mr. Kavazanjian who has been in both areas.

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THE COURT: You're asking this witness a hypothetica We are not talking about it now.

Q Assuming Mr. Friedman, that conditions are exactly the same in two areas, one of which applies the substantial time rule and the other of which applies the majority time rule, is it not possible that employees who are doing the same work will receive different compensation, different grades in return for their services?

A Yes, sir. That fact is inherent in the exception to the general rule. If you accept the exception, and if you have the two employees are carrying out the same duties, and have the same responsibilities, and all the conditions are the same, you could have an exception in the one case, on the substantial rule.

In the other case you would follow the majority rule, and you would have two different grades, and in that sense you have a disparity in grades, yes, sir.

Q Do you know, sir, if the Civil Service Commission in any way sanctioned or approved the use of two different standards by the Immigration Service?

A Well, not two different standards. They are the same standard. And it is an application of a legitimate and proper exception to the general rule. The standard is the same. That hasn't changed any.

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Q When I say standard, I mean two different criteria, and I ask you whether the Civil Service Commission in any way sanctioned or approved this divergence.

A Well, the Commission issued the regulation or the rule which covered the exception, so to that extent, it is a sanction, if you want to call it that.

Q Sir, I would like to show you Plaintiff's Exhibit 1 in evidence, which is a letter from the director or personnel, or letter to the director of personnel of the Immigration Service, from Alvin W. Norcross, the acting director of the Bureau of Inspections of the Civil Service Commission.

THE COURT: I have given him my copy.

Q I ask you to look at that. I ask you whether or not that letter represents a sanction or approval by the Commission.

MR. ADAMS: I think that letter speaks for itself, your Honor. I would object to that question.

THE COURT: First, take a look at the letter so that you know what the subject matter is.

(Pause.)

THE COURT: What portion of the letter do you want to call the witness' attention to?

MR. ROTHSTEIN: Page 1, the second full paragraph.

THE WITNESS: What is your question?

Q The question is whether in your opinion this represents an approval by the Civil Service Commission of the application of the majority time rule in New York while the substantial time rule was being applied by the same employer in El Paso.

MR. ADAMS: I have the same objection that I had before, your Honor. The letter speaks for itself.

THE COURT: Well, that is true.

Is there any comment that you want to make in respect to that paragraph along the lines of the inquiry that will skirt the technical objection?

THE WITNESS: Well, what this paragraph does, what the whole letter does, is to clarify the Commission's rule about majority time rule and the exception to the rule, and it spells out almost what I said before about the use of the exception, and it gives the exception in terms of the specific cases at the specific locales, in El Paso and others, where the exception was used, and the Commission said this was a proper use of that exception.

Q Now, the letter sir was written in 1969. In 1966, at the time that you did the audits, were you personally aware of whether or not the Civil Service Commission had made any such statements regarding application of the majorty versus the substantial time rule by the Immigration Service?

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MR. ADAMS: Your Honor, I just want to get one clarification.

We are talking here about application in one respect by the Civil Service Commission and another by the Immigration Service. I'm not sure I understood the question as to which it was directed to.

THE COURT: To which agency are you direcing the question?

MR. ROTHSTEIN: I am directing it to the Immigration Service's own inhouse classification.

THE COURT: And the question again was?

MR. ROTHSTEIN: Whether he was aware of any similar views expressed by the Civil Service Commission at the time he did the audits, regarding the right of the Immigration Service to classify people differently in different parts of the country.

THE COURT: Well, Mr. Adams has called your attention to the fact that you are using Civil Service and the Naturalization interchangeably and I think you just did.

Now, which are you talking about? I thought you said in response to my question whether there was an in-house rule of the Naturalization Service that considered a classification and an exception; isn't that what you said to me?

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MR. ROTHSTEIN: What I am referring to is any approval by the Civil Service Commission of this in-house rule of the kind that is represented by the letter that I showed the witness but which was written in '69.

MR. ADAMS: In-house rule --

THE COURT: I am not accepting the statement that it is a rule. Do you know of any expression of approval or dissent from the notion that there was a majority rule and an exception to that rule at the time that you were doing the audits?

THE WITNESS: No, your Honor.

THE COURT: In other words, what you did refer to was the bulletin itself, Exhibit H. This was in existence in 1966, is that right?

THE WITNESS: Yes, sir.

THE COURT: And I don't know that you know of no letter of comment or further expression in 1966 as a guide-line from the Civil Service Commission on this subject.

THE WITNESS: That's right, your Honor.

THE COURT: All right.

BY MR. ROTHSTEIN:

Q At the time that you did the audits in 1966, were you aware of the fact that the Immigration Service was classifying people differently in New York than they were in the

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western part of the United States? By that I mean that they were applying the substantial time rule on the west coast but not in the New York area.

MR. ADAMS: I object to that question. That is factually, the predicate for that question is factually incorrect.

MR. ROTHSTEIN: Your Honor, I asked --

MR. ADAMS: What was done in August, November, August through November of '66 --

THE COURT: Here's the way we meet that:

To your knowledge, were there any classifications on the west coast in 1966 under the substantial time rule in the Immigration Service?

THE WITNESS: No, sir.

THE COURT: That ends the question.

Q Were you aware of the fact that the Immigration Service in New York was applying that majority time rule in their in-house classifications?

A Yes.

Q Was this one of the factors which entered into your determination of which rule to apply?

A No, sir.

Q If you were aware of the fact -- strike that.

Had the decision been different and had the New

York region been applying the substantial time rule, would this have made any difference in the criteria which you used in adjudicating the classification appeals of the appellants?

MR. ADAMS: I object to that question.

THE COURT: You mean if there was a different rule than the one he applied, would the result be different; is that what you're asking?

MR. ROTHSTEIN: I'm saying:

If in New York the Immigration Service has been promoting people based on substantial time at a higher grade and mixed grade position, would this have been something that would have influenced Mr. Friedman's thinking in determining which rule to apply.

THE COURT: Let's skirt the objection again.

To your knowledge, in the New York area, in 1966, was the substantial time rule applied?

THE WITNESS: No, your Honor.

Q Asking again the hypothetical, if in fact the substantial time rule had been applied by New York, and you had been aware of this, would this have made a difference in which rule you applied?

MR. ADAMS: That is the question I objected to.

THE COURT: Sustained.

Q Did anyone discuss with you, Mr. Friedman, which

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rule was to be applied, substantial or majority?

A No, sir.

Q Did any of the appellants discuss that matter with you?

A It came up at some point in our discussion, yes.

Q When did it come up?

A Because it happened so long ago, I'm trying to recall, but I think it came up almost at the beginning, when I spoke with the leaders of the appeal, if you want to use that term, that we discussed the criteria in the standards, and the applicability of the standards and what approach we would take in determining the classification of those positions, and it must have come up, I'm sure it came up at that point.

Q What did you tell them at that point?

A I gave them the general rule, as I mentioned before, and the exceptions, when they are used and when they are appropriate.

Q Did you tell them which rule you were going to apply, the majority or the substantial?

A I didn't tell them specifically which rule I was going to use because I would have to see which rule to use after I had secured all the information that I needed, all of the facts that I needed, and then I would have to make a judgment at some point as to whether the exception was

applicable or not. So I couldn't know this at the beginning. I couldn't know this when I was interviewing the appellants at the beginning of the appeal.

Q In other words, you told them that substantial time rule might be employed?

A I probably gave them the exception and explained under what conditions it would be applicable.

Q Now, Mr. Friedman, you stated before that the majority time rule is more precise than the substantial time rule in that you need to know whether fifty-one percent of an employee's time is at the higher level work, is that correct?

A That's correct.

Q And in fact, you need a precise calculation to do this, do you not?

A Well, precise indicates that you can measure this with a ruler or slide rule, and you cannot. But the total figure that we use is a precise figure, yes.

Q Doesn't it have to be precise, Mr. Friedman, because of the fact if a man is working forty-five or forty-nine percent on GS-12 work he doesn't get it but if he is working on GS-12 work for fifty-one percent of his time he does get it, aren't we dealing in a minute area of divergence?

A Well, if you use the bare figures, the answer

would be yes. But you very seldom get that kind of break-down where the assignments are exactly fifty-one percent or forty-nine percent. Usually they fall within a much wider range, you know, forty, forty-five, and you can measure that; whereas, they might be sixty percent or fifty-five or seventy or eighty percent, you see.

Q In making the computation, Mr. Friedman, is it necessary to take into account how many days a man was out of the office either on sick leave or annual leave or administrativ leave or any other kind of leave which would take him away from his work?

A I think when I came up with my computations of time I excluded those days away from the office.

Q Did you make such calculations?

A Yes.

Q Did you arrive at percentage figures when you did your New York audits in '66 as to how much time each man was spending at GS-12 level?

A I did.

Q Where did those computations appear, were they in the letters of decision?

A I would have to see the letter to recall whether we included that, whether we told the appellants that because they did not spend the majority of their time on grade 12

cases therefore we couldn't give them the grade 12. I don't recall the language offhand. They would be in my notes of course, those notes that I had at the time.

MR. ROTHSTEIN: In the interest of time, I would ask Mr. Adams to stipulate with me that the letters of decision which were issued by the Commission in February of '67 contained no precise percentage figures of how much time was on nigher level work, but only said that in the case of denials it was not for a majority of the time.

MR. ADAMS: That is correct, there were no precise percentage figures in the cases -- there were four or five different forms -- but no percentages in the ones I have seen.

Q I ask you, Mr. Friedman, where did your calculations appear; where were they made?

A These were made after I returned to my office with my notes, which had information about the cases assigned to the appellants, and I calculated my percentages in my notes at that time in my office.

Q When you say in your notes, are you saying that you worked out mathematically what percentage of the employee's actual days work during the given period was on grade 12 level work, figuring in absences, sick leave, annual leave?

A Yes. Well, simply, the way I did it, I took the cases, and I had information from the diaries of the appellants

as to when they were assiged a case, when they completed the case, if they had completed it, and an estimate from the appellant on how much of their time during the year, how many hours they spent on that particular case.

I had this information. I brought it back with me to the office. And I then, first, determined in my own mind, by interpreting the case, and by interpreting the standard, I arrived at a judgment as to whether I thought that case was grade 12 or grade 11 first, without any time.

Then I took the number of hours in the year less the time they were off for vacation or leave, and I made a percentage calculation of the number of hours on those cases which I thought were grade 12 level and I arrived at a percentage.

Q And did you do that in your notes for all of the appellants?

A Every one.

Q Sir, I would like you to look at Defendant's Exhibit F, which were introduced as notes which were made in the course of the appeals of Mr. Kavazanjian and Mr. Lazarus. I would like you first to identify them, indicate whether or not they are your notes, and then indicate to the Court where you have made the computation which you say you have made for all of the appellants regarding the actual

percentage of time spent at higher level work.

A It looks like my handwriting, so I will say these are my notes.

I don't find any precise calculations other than the one note here on Mr. Kavazanjian's notes that "Spends one hour a day on record searches in Nassau and Suffolk County" and on Mr. Lazarus' notes there is something about "Spends about seventy-five percent of his time on revocation racketeer cases," but I don't see the kind of calculations that I mentioned before specifically.

Q Do you still state, Mr. Friedman, that you made such calculations in the case of every appellant?

A I did, yes, sir.

Q In fact, such calculations would be absolutely necessary to a fair determination, would it not?

A Yes.

Q Is it also true that in order to determine exactly how a decision was reached, it would be necessary to review your calculations to see what the input was, what the total number of hours work was and how you arrived at your mathematical conclusion regarding the amount of time spent at higher level work?

A Sounds reasonable, yes, sir.

Q Who assisted you in conducting these audits,

Mr. Friedman?

A It wasn't really an assistant. I did most of them. I can't tell you exactly, but certainly forty or so of them I did myself. And the others were done by one or two other personnel management specialists in my office.

Q Who were they, what were their grades?

A They were Mr. William Hayden. He was a grade 12, GS-12, and Mr. Joseph Scheinin; he too was a grade 12.

Q Do you know if they had had any previous experience in classifying Immigration positions?

A Well, Mr. Hayden was an inspector, and he had made inspection of personnel management at the Immigration Service once or twice or maybe three times. Mr. Scheinin I think had also made at least one inspection of the Immigration Service.

Q Did they also take notes and make computations as you did?

A As far as I know, yes.

Q Did they make their own computations or did you make them based upon their notes and findings?

A No, no, no. They made their own. Each one was fully competent in classification and each one could do his own classification work.

Q But they also computed the number of hours.

A Yes, to arrive at the determination whether it was the majority or not.

Q Mr. Friedman, when you did these audits, were individual appeals files set up by you or by your office?

A I'm not sure whether we set up an individual folder for each one or whether we kept them in a few folders, by groups.

Q Would you describe exactly what these appeals filed or folders looked like, how they were set up, what they were contained in and what material was put into these files?

A Well, when we receive an appeal, we go through the procedures of acknowledging it, logging it in and sending the acknowledgment letters to both the agency and the appellant, requesting certain information.

At that point my secretary, my classification clerk, used to establish a folder for each case, with a name on it.

Q A separate folder for each appellant?

A A separate folder for each appellant. It would have the name and the date of the receipt of the appeal, I think, on the heading strip. And in it she would put anything we had received from the appellant, his letter plus anything else, copies of the letters that we sent to acknowledge the appeal, and any other information which we would get from the agency and the appellant, plus our notes. The classifier's audit notes would go into the folder after we finished the audit, and finally the letter of decision would go in the same folder.

Q What about the calculations which you say were made that formed the basis for the finding? Would they go into the folders?

A Anything which related to that specific appeal would go into that folder, yes.

Q And a separate folder was set up for each person appealing, so we can get that straight?

A Yes. There is no doubt about it. You mean on this appeal?

Q On this appeal.

A No, I'm not sure about that, because it came in as a group and either I treated them as individuals in terms of making desk audits or I'm not sure whether they

established a separate folder for each of the names on the group appeal.

Q Tell me what was done then, sir, with all the material that came in. Was it thrown into a desk or was it set up in some kind of organized way?

A Oh, it was organized. It was either one folder for a group or individually. The material was put into the corresponding folder.

Q Was it set up in such a way so that anyone wishing to review the Commission's files on a particular case would be able to have access to it? I am speaking about logistically.

A Yes. Because the material was available to the appellant. There wasn't any restriction. So it was available to the appellant any time, and it was so set up that it could be reviewed by the appellant.

Q Were you calculations on grade 12 cases also available to the appellants to review?

A Yes.

Q And how were they made available to the appellants?

A Well, very simply. When the appellant came into the office and asked whether he could see the file, we would give him the folder.

Q And he would actually get to see, you say, your notes, calculations?

A He would have the whole folder. Whatever was in it he would have available to him.

Q Are you aware of the fact, sir, that when a large number of the appellants attempted to review their folders after your adverse letters with regard to their cases, they found very little relating to the appeals and in many cases did not find either your notes or the calculations which you say were made?

A I don't recall what they found or what they didn't find. The material that was available should have been in the folders.

If it was not in the folder, it may have been sent to our headquarters in Washington after the appellant had raised some objections to our decisions and had requested the Civil Service Commission in Washington to review the appeals. If Washington had accepted that request or those requests, at that point we would send everything we had to the Commission in Washington.

Q Are you saying, sir, that at that point the entire file would be sent to Washington or just part of it?

A No. The entire file. Except we would keep a copy of our decision letter, which was run off, we had no

trouble having copies of those, and probably the letters which we sent out to acknowledge and receipt, here again a form, and we had enough of those. So we would keep just those bear one or two items in the folder. The rest of it went to the Commission.

Q Do you know of your own knowledge, sir, your own recollection, when the files were sent to Washington, what month?

A No, sir. I couldn't recall that.

Q Well, your decision, sir, was in February. About how long after your decision, if you can recall approximately, was the material you mentioned sent off to Washington?

A Oh, let's say maybe a month or two.

Q A month or two.

A Right. That is an approximation.

Q Are you aware, sir, of the fact that the government has represented to the plaintiffs and to the Court that the audit notes which were made by you are not currently available because they cannot be located, with the exception of the notes of Mr. Kavazanjian and Mr. Lazarus' audit?

A I've been made aware of that, yes, sir.

Q Do you know of your own knowledge what

happened to those notes which you just testified formed such an important part of the decisions which you made?

A No, I don't.

Q When was the last time that you personally saw them?

A Oh, I guess not too long after the decision was rendered, which would be back in -- you say February '67? Somewhere around there.

Q Do you know of any reason, sir, why the notes of Mr. Kavazanjian and Mr. Lazarus should be available and not the others?

A No, sir.

Q Were in fact Mr. Lazarus and Mr. Kavazanjian among the first people that you audited?

A Yes, sir.

Q Do you remember when you audited them?

A Not exactly when. It was soon after we had received the appeals.

Q Well, if you would look at the exhibit to refer to the dates, which are on top of the first page of each, referring to Exhibit F, I ask you if that refreshes your recollection as to when you saw this.

A I made it a practice to put the date of the audit at the top of the page before I started it. I still

follow that same practice. yes, sir.

Q And what were the dates, then?

A July 26, '66 for Mr. Kavazanjian, and the other one, Mr. Lazarus -- I can't see it. I don't know if it's rubbed off.

Q I believe it may be in the upper left-hand corner.

A Yes. I can't make it out. There is something there crossed off or that didn't come out too clearly.

Q Well, I note that the xerox copy which I have of it has the notation of 8/25/66 on it.

A Then it is correct. If that's what you can read from it, I would say that's right.

Q In other words, you saw Mr. Kavazanjian in July and Mr. Lazarus in August.

A Yes, sir.

Q When were the appeals filed, again, sir?

A I think it was in May, wasn't it?

Q When did they cross your desk?

A I don't recall exactly, but they crossed my desk a day or two after they came into our office.

Q Did you see anyone else at the time you saw Mr. Kavazanjian and Mr. Lazarus?

A You mean at the same time?

Q During the same period, in the summer of '66.

A Well, I interviewed, as I said, roughly 40 or at least 40 of the appellants and I interviewed them at some point during the summer of the ensuing months and I tried to schedule them for one in the morning and one in the afternoon so as to allow myself enough time.

But I couldn't tell you exactly when I saw any one individual other than these two, which have the notations on the notes.

Q Can you tell me, if you know, when you finished making your audits?

A No. It might be in the fall of that year, maybe towards the winter. November, December, around there.

Q November, December. Why did it take that amount of time, from May ot December, for you to interview all of the people that had to be interviewed?

A Well, it is hard to tell you at this point. But I can tell you this.

I remember now, when I interviewed Mr. Kavazanjian, there was a gap between that interview and the one for Mr. Lazarus because I think Mr. Lazarus was ill at the time, he was not available. So I had to postpone his interview until a later date.

Q What about the gap of the period of time between August and December? What accounts for that?

A Well, it wasn't really a gap. We were doing some of the appeals right along and we had other work loads. I couldn't tell you at this point the reasons for any unnecessary delays or any undue delays or long delays. I couldn't reconstruct that for you.

Q How many people were you seeing a day?

A A day? I tried to make it two a day. I may have been able to see three or so in some cases.

Q How much time were you spending with each one, on the average?

A Well, I would say I spent at least an hour on each, and the average would have been much more, maybe two to three hours, two and a half hours.

Q So what would you say the minimum amount of time you spent with anyone was?

A I would say forty-five minutes to an hour.

Q Thatwould be the minimum?

A The minimum.

Q In view of the fact that you testified that many of the audits were of a duration of an hour or so, why was it necessary to see only one in the morning and only one in the afternoon?

MR. ADAMS: Your Honor, I think that has been already testified to as to what his practice was.

THE COURT: That's the way he organized it. That's why it was necessary.

Q So did you make advance arrangements with people, "I'll see you on the afternoon of September 30th or the morning of September 10th"?

A Yes, sir, I did. I did, with a few exceptions which came up because either the appellant was not available or something came up and he was not available at the appointed time and I made a substitution at that point.

But generally I did make advance arrangements with the administrative officer there, and he made them with the appellant so they were available at the time that we set up, and we tried to allow enough time, as I said, and we set up onein the morning and one in the afternoon.

Also, I had other word to do in the office. So I had to take care of some other things too. So I didn't -- I just couldn't devote forty hours a week five days a week to these appeals alone.

Q They were all located in the same building, weren't they, 20 West Broadway, New York?

A Yes.

Q So is it fair to say that you certainly

weren't in any hurry to get the group appeal finished, because it took you from April or May, when you received the appeal, until December to speak with everyone located in the same building at 20 West Broadway?

A No, that's not a fair assumption at all. Because "Hurry" is a relative term. We were doing them in the best way we could, fitting them into the work load we had, giving them the consideration that we had to give them, giving them as much time as we had to. It wasn't a question of being in a hurry or not in a hurry. We had to give them decisions and we had to get the facts and we had to make arrangements for those interviews and we had to review those facts and we had to analyze them, we had to interpret them, we had to evaluate them in terms of the standards.

So this was the regular process, and I don't think I would characterize it as being in a hurry or not in a hurry.

Q But there were three people doing it, weren't there?

A Well, mostly me, as I say. Mostly I was doing them. And at some point later I had the assistance of the other two classifiers.

Q So after you concluded the interviews of Mr.

Kavazanjian, at that point did you have all the information which you needed to render a decision in this case?

A Yes, sir.

Q I ask you then, sir, why you waited from July of '66 until February of 1967 in order to render your decision in Mr. Kavazanjian's case.

A Oh. This was a question of logistics again. We determined that we would send the decision letters at the same time or pretty close to the same time, rather than sending them out piecemeal, because the audits were extending over a long period of time and we felt it would be wiser for us to wait until we had finished all the audits and made our decisions and sent our letters out at one time rather than sending one out in July or August and, maybe it was an adverse decision, stirring up that appellant and the others wouldn't know what our future decisions might be and we would have some problems in that sense.

Q What do you mean, sir, by "stirring up that appellant" with your decisions?

A Well, when an appellant files an appeal, he wants to get a higher grade, naturally. And if you give him an adverse decision, he is unhappy, which is normal.

Now, if you have a group, and there may be

some decisions which might be in the appellant's favor and some not, if you give a decision at the beginning of the appeals of the group, which might be adverse, you would be getting a lot of inquiries, a lot of reactions which may be unnecessary because they had no way of knowing what would happen to their individual appeals.

So we thought it best not to do anything until we covered the group as a whole.

Q You say "reactions" from the person who was stirred up. Would one of those reactions possibly be an appeal to the Bureau of Inspections in Washington?

A Yes. This didn't bother us too much.

Q Well, by delaying a decision, sir, didn't you also delay that appellant's right to appeal his classification to Washington and possibly obtain a higher grade and pay at a higher rate at the earliest possible period of time?

A Yes.

THE COURT: Did any of these people appeal individually or was this a mass, joint appeal of a grade?

THE WITNESS: A mass letter, a group letter, and they all signed the letter.

THE COURT: Did anybody ask you to single

them out for immediate treatment?

THE WITNESS: No, sir.

THE COURT: So it was a class action, so to speak, wasn't it?

THE WITNESS: Yes, sir. That's right.

Q But you did determine, did you not, Mr. Friedman, to handle them all on an individual basis?

A Well, in terms of getting the facts, making the audits. We determined that we couldn't audit just a representative few of the appellants and use the results of those audits as representative of the group because the nature of the occupation is such that we had to know each individual's assignment. So in that sense they were individual.

But when we completed our review and we found that we could treat some of them alike because the nature of the cases that they were given were very similar and we could come to the same conclusion about certain small groups, at that point we decided to treat them as a group in terms of a letter of decision.

So you will find there are, I don't know, ten or elevent different letters to the appellants. Some of those letters could have maybe one appellant. Others may cover six or three or seven.

Q After you saw Mr. Kavazanjian in July and Mr. Lazarus in August, did you change your strategy, your approach in any way?

A I didn't have a strategy really. It wasn't -- the approach was the same, the same process that I used. You know, actually the classification process is the three steps that we followed. I mentioned them before, I think:

The facting, the analysis of those facts, and the evaluation in terms of the standards. This didn't change.

Q The letters of decision, sir, which were released in February of 1967, I ask you when were those letters prepared?

A Well, they were probably prepared over a period of time, which may have run four or five weeks.

Q And when were these letters made available to the Immigration Service as the employer?

A Copies of our decision went to the Immigration Service at the same time as they went to the appellants.

Q Were any drafts shown to the Immigration Service?

A No, sir.

Q Now, following your decision on the appeals,

which was made in February of '67, there was an appeal by all whose cases had been denied to the Bureau of Inspections in Washington, is that correct?

A That's right.

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Q And would you explain what the function of the Bureau of Inspections is when they receive appeals from an adverse decision by what the New York Civil Service region has done?

A Yes, sir. Under the Commission's delegation of authority, the regional offices, which would include the New York region, has the final authority to adjudicate classification appeals. However, this does not exclude the Commission's central office from looking at such an appeal under certain conditions. One of them would be if the appellants submit additional facts, additional information which was either not available to the regional office, or not submitted to the regional office, or, too, if the Commission when it gets the requests for review of the appeal sees that it was apparently a misinterpretation of the standard, or just the decision wasn't borne out by the facts, and at those points they can reopen or they can examine the appeals.

Q Was the bureau in effect an appellant body reviewing the decisions which you had made?

A Yes, only at their desire. Let's put it that way.

Q Once they had made the determination to review, they did in effect become an appellant body reviewing your determinations?

A Right.

Q Who was in charge of this appeal for the Bureau of Inspections, do you know?

A At the time it was, I can't think of his name, Glas -- Jack Glashein, G-l-a-s-h-e-i-n, I think is the way it is spelled. He was the chief of the appeals office in the Bureau of Inspections.

Q What role did Mr. Charles Van Tassel play?

A Well, he was an employee of that appeals office, and he was the one who was given the assignment of reviewing these appeals.

Q Do you know if he utilized the notes which you had made?

A I couldn't tell you at this point. I don't remember whether he did or not.

Q Did Mr. Van Tassel discuss any of the cases with you?

A I think we had some discussions, and I couldn't recall exactly at this point whether we discussed individual cases or whether we discussed the whole appeal of an appellant.

Q Do you know if Mr. Van Tassel discussed with you any cases which he considered borderline?

A I think we did do that. I think we did.

Q You went into the merits of the case or lack thereof?

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A Well, I gave him my judgment, and then he had the benefit of my thinking on the cases.

Q Did Mr. Van Tassel let you know who he was thinking of upgrading?

A Not until he was all finished with his work in New York.

Q When you say all finished, was this prior to the issuance of the letters of decision which came out of the Bureau of Inspections in June of '67?

A Yes, I think we had some discussion of some appellants and so[illegible] that may have been bord[illegible] line. I'm sure we had some discussions on those before a decision letter.

Q Did you express your reactions to the people that Mr. Van Tassel was thinking of upgrading?

A I'm sorry, I don't follow that question.

Q When he said, here is Mr. X, I'm thinking of promoting him, what do you think, Mr. Friedman; what did you say, did you express your opinion, your views?

MR. ADAMS: The testimony has been otherwise.

THE COURT: Did he ask you what you thought?

THE WITNESS: Not really what I thought. We got into the nature of a case, whether we thought that it met the criteria of the standard for this grade 12 type case. It was that sort of discussion; in other words an exchange of interpretation, exchange of judgments, so to speak.

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Q In other words, Mr. Van Tassel, of the Bureau of Inspections, was reviewing the correctness of what you had done as an appellant body in the Commission and at the same time you were presenting your views in discussion with them and you had advance knowledge of who Mr. Van Tassel of the Bureau of Inspections was thinking of upgrading, is that a fair summary of what happened?

A No. Up to a point, up to the last part, I did not really know whom he was going to recommend for upgradings. If I gave you that impression, I'm sorry. We discussed those appeals, those cases which appeared to present some problems of interpretation of the cases, so I gave him the benefit of my thinking and all the information that I had, and then he would go back and make his own decision. So I didn't know in advance who was coming up for higher grades, no, sir.

Q Mr. Friedman, I'd like to show you Government's Exhibit C, which Mr. Adams and I have agreed to stipulate are the notes which were made by Mr. Van Tassel; is that correct, Mr. Adams?

MR. ADAMS: That is correct.

Q And I direct your attention to page 1, the second paragraph from the bottom, which comes under a section referring to Mr. D'Amico, and I direct your attention to the statement, all of which is not ledgible in my copy, but which

begins, Mr. Friedman says that the anti-air smuggling problem did not involve anti-something or other, no smuggling.

MR. ADAMS: International.

Q International smuggling, no smuggling was reported as resulting from this bureau activity.

I ask you, sir, if you remember how the information contained in that sentence was conveyed by you to Mr. Van Tassel.

A Oh, I'm sure it was done by discussion between the two of us, supplemented by my notes which I had which would be on my end of the discussion, so to speak.

Q Then is it not correct that a portion of Mr. Van Tassel's determination was based on these discussions which he had with you?

A No, I would rather --

MR. ADAMS: I object to that question. It calls for --

THE COURT: Objection overruled. What is the answer?

A I would rather look at it in terms of he was getting some additional information that I had which perhaps he had not gotten on his own or which he had gotten and maybe mine could supplement what he had.

Q In other words, he was reviewing the propriety of

what you had done and you were helping him in his review?

A No, no, sir. He was reviewing the decision that I had made.

Q He was reviewing the correctness of that decision, was he not?

A The correctnesse of the decision? Yes. That's right.

Q And you were helping him.

A No, sir.

Q Well, why did you give him the information?

A I was helping him to arrive at his own decision, and for him to do that, he had to have the benefit of all the information he could get, either on his own or from whatever source and I was just additional source of information for him.

Q You were a source of information?

A That's right.

Q Information not contained in your files or in your notes?

A Well, most of it was in the notes. It was in the notes, and sometimes the notes might not have been clear or they were shorthand, so to speak, and they would call for some clarification and I would supply that.

Q So the analysis of the record was a team effort

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then by you and Mr. Van Tassel?

A Not fully. It was a partial team analysis. But this is only one part of the process. But the evaluation was his. The conclusion was his. He was coming in as the appellant office to review my decision, and so he had to make his own decision, and the analysis was his, supplemented by whatever help I could give him.

Q Mr. Friedman, were you aware of the fact that the Immigration and Naturalization Service was conducting its own survey of work being done by its investigators nationwide bewteen January 1966 and March of 1967?

A It is very vage in my mind, but now that it's mentioned, I was made aware of it in connection with one of the appellants who refused to be interviewed by the representatives of the Immigration Service in connection with their survey.

Q Well, I'm referring, sir, to a period that took place at approximately the same time that the first audits and the appeal were going on between January of 1966 and March of 1967. I'm sorry, I didn't hear your answer; were you aware of the survey that was being conducted at that time?

A I mentioned only after I was informed, I can't tell you exactly how it came up, but one of the appellants in the first group or the second group, I don't know, but one

of the appellants did discuss with me the fact that he didn't want to be interviewed by a representative of the Immigration Service?

Q Mr. Friedman, I'd like you to look at Defendant's Exhibit L, if you would, which is an international memo of the Immigration Service, which the government has introduced in evidence on stipulation.

I would like you to refresh your recollection by looking at it, and its discussion of the audit of GS-12 investigations cases, Northeast Region, and after, I would like you to read the last paragraph on page 5, which says, "The Civil Service Commission, New York Region and Boston Region, as well as the Civil Service Region representatives in Hartford were all contacted. Initially Mr. Friedman (New York Region) indicated that he would be available during the New York inspection and that Mr. August would participate in the Newark inspection. All others indicated that they would not be available. Upon contact, however, Mr. August was not available; Mr. Friedman came to the New York office on Wednesday, March 3rd, and Mrs. Macklin briefed him on the approach being followed. He stated that this was the approach he would follow but saw no need for participating at this point."

I would like you to refresh your recollection by looking at this memo and I ask you again whether or not you

were aware of the audits which were taking place during the period of time I stated.

A The paragraph you read indicates that I was aware, and I would agree that I was aware at that time.

Q And , in fact, you were being consulted by the Immigration Service vis-a-vis the in-house audits that they were doing?

A Well, not consulted so much as being advised of what they were doing in connection with the appeals that we had.

Q Do you have any recollection now of exactly what INS was doing that they spoke to you about?

A No, sir.

Q Would it refresh your recollection if I told you that INS was doing a survey of GS-12 positions nationwide in order to make promotions administratively independent of what the Civil Service Commission was doing?

MR. ADAMS: Your Honor, I would like to strike the last phrase of Mr. Rothstein's statement as to his conclusion as to what INS was doing. I have no problem that they were making a survey at th is time of GS-12 work.

THE COURT: Can you reframe that?

MR. ROTHSTEIN: Well, I'm trying to refresh the witness' recollection to state that the documents which are in

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evidence demonstrate that INS was making a survey nationwide which is discussed in Exhibit L and that as a result there were promotions that were made, and I would that the witness look at Exhibits N and M also in order to see if he can't refresh his recollection about what was going on at the time.

A Yes, my memory is refreshed. I don't have to read it through to know what happened.

You see, we had this appeal, the first group was back in '66, we did have some upgradings recommended both from our office and from the Civil Service Commission in Washington. At that point or some time after that, the agency, the Immigration Service, decided to review all their positions and I think it was done at the suggestion, the strong suggestion of the Civil Service Commission in Washington, and to go back a little further, we had raised some points with our headquarters because we were getting all these appeals, really tying up all our resources, and we got in touch, we were in touch right along with out headquarters, and we strongly suggested to them, strongly recommended that they get the Immigration Service to review their positions, which I suppose had not been done for some time, to make a survey of these positions and to classify them based on the current assignments, current duties, and this was in response to that kind of a request or a little pressure perhaps from the Civil Service Commission, and the

survey resulted.

Now, the survey was not to promote people. That is not the purpose of the survey. It was to review the position and to classify them properly. Now, if some came up higher grades proper classification, that's all right. If some remained the same, that is the survey result. And it is all in connection with the agency, his authority to classify their own positions. You see, the law gives them that authority. The Commission doesn't give them that authority.

Q Is it correct that INS was reviewing the amount of GS-12 level work performed by its investigators in the course of this survey and that those who were entitled to higher grade levels were to be promoted from GS-11 to GS-12?

MR. ADAMS: Your Honor, I object to that question as to asking Mr. Friedman an employee of the Civil Service Commission, what the motives, intentions and purposes of the Immigration Service was.

THE COURT: Did you know that that was what they were doing?

THE WITNESS: I found out much later.

THE COURT: Then you did not know?

THE WITNESS: I did not know at that time.

THE COURT: You learned about it through hearsay?

THE WITNESS: Yes.

Q You subsequently learned about it, is that your testimony?

THE COURT: He said he learned some hearsay subsequently. He didn't say he learned it. It implies a dragnet for all of your question.

Q Sir, I'd like you to look at Exhibit N, and the pages are not numbered so we have to look at the dates in the upper righthand corner, and in particular I would like you to look toward the back at the page dated June 23, 1967.

A All right.

Q Which is a memo from the Regional Commissioner, the Northeast Region of the Immigration Service to the Associate Commissioner for Management, stating, "As the result of the recent reevaluation of the classification review of grading GS-12 investigative work, this authorized force for your region has been changed as follows," and below are indications of four names of people who were being upgraded.

I ask you to look at that and at the same time to take a look at Plaintiff's Exhibit number 27 in evidence, which is entitled, "Northeast Region Percentage of GS-12 Investigations Casework Performed by GS-11 Investigators, 1956 to March 1967," computed from cases presented by the districts.

I would like you to look at that single page. I ask you to note, sir, the percentages of time spent on

GS-12 level work which is indicated next to each time, and also to note that no person promoted as a result of this survey was performing GS-12 work for anywhere near a majority of his t.me, and I ask you to state whether in your opinion this represents the application of the substantial time rule by the Immigration Service in connection with the upgrading of the people through the survey.

MR. ADAMS: I object to that question. None of the documents that Mr. Rothstein has mentioned have ever as far as I know, been seen by Mr. Friedman. They speak for themselves. He is asking for a conclusion on the part of what the Immigration Service again did, and I don't think that the conclusion is warranted. The document speaks for itself.

THE COURT: Whether it is warranted or not is a subject of argument from the evidence in the record, isn't it, rather than to question this witness about what the Immigration Service was doing?

MR. ROTHSTEIN: What I'm doing, your Honor is --

THE COURT: He was not the Immigration Service. He was the Civil Service.

MR. ROTHSTEIN: I am asking for an expert opinion on whether these documents, which do speak for themselves, establish the use of the substantial time rule, the way he has described it.

THE COURT: You can argue about that if you wish, but I don't think the witness is required to characterize the documents of another agency.

THE WITNESS: Shall I answer or comment, your Honor?

THE COURT: If there is anything that you want to comment about that you can explain to us for the sum of our knowledge that is other than a conclusion on your part, let's know about it.

THE WITNESS: Well, I would just comment that the agency was doing, making this survey as part of its authority and its required authority to classify its own positions, and this has nothing to do with determining what we do on our appeals, you see.

Q In other words, assuming that the agency was applying the substantial time rule, and assuming that they were upgrading people with thirty percent, this was being done at the same time that you were denying appeals of people who were doing GS-12 work for as much as forty percent of their time, is that correct?

A Well, what you're saying in effect as I understand your question is that the Civil Service Commission was adjudicating appeals on the same basis for these appeals from Immigration as it does for other appeals, whereas the agency was

doing something else, but until what the agency does came to our attention in some way, either through an appeal or through an inspection, we wouldn't be aware of it, and we wouldn't do anything about it.

Q Were there people by the way --

THE COURT: Is there anything on that sheet to indicate this is within the exceptions or without the exceptions?

THE WITNESS: It just has a bare percentage. I see one, it says sixty-two percent on a promotion, so this is one of those that does follow the majority rule.

Q Well, I am referring to those men who were listed.

A I see only two promotions here, is that right, just two?

Q I'm talking about June 23, '67, Cooper, Tarrant, Rhodes, Latchford, each one of which is shown to be doing grade 12 work for twenty-nine percent of his time on Exhibit 26.

A Which names again? Cooper --

Q The names that are indicated on the paged dated June 23, 1967.

A June 23rd.

Q Cooper, Tarrant, Rhodes and Latchford, all in the Northeast Region, all performing grade 12 level work for

twenty-nine percent of their time, and all upgraded by the Immigration Service to GS-12 by this document which is part of Exhibit N.

A Well, I can't tell you what the basis of their thinking was, and how they arrived at the use of the exception, which is really what you are saying. They used the exception rather than the general rule, the majority rule, and I have no way of knowing what the basis for their use of the exception was.

Q But this is at the same time as you and the Commission were denying promotion to people doing as much as forty percent GS-12 level work?

A It wasn't the same time. This is after, wasn't it, about a year later or something.

Q When was the final decision of the Bureau of Inspections on the sixty-six appeals? Was it in June of 1967?

A I don't know offhand when the actual date was.

Q The record will show that it is. In fact, sir, if you look at the page immediately preceding the one I have directed your attention to, which is dated June 16, 1967, you will find the personnel action which upgraded those whose appeals were granted.

A Yes.

Q And I ask you again sir, whether or not the two divergent standards were being applied in the Northeast

Region contemporaneously.

MR. ADAMS: Your Honor, I object.

THE COURT: Sustained.

Q Mr. Friedman, I would like to turn now to the appeals which were filed in June of 1968. And I ask you, sir, what your position with the Commission was during that period, and what your function was vis-a-vis these appeals.

MR. ADAMS: Could you identify what appeals, by whom? Not by name, but just describe the field.

MR. ROTHSTEIN: For the record, I am referring to page 1 of Government's Exhibit B, dated November '68; all of whom were general investigators with the Immigration Service.

Q My question, Mr. Friedman, was, what was your position at that time and what was your function vis-a-vis these appeals?

A It was the same as it was in '66.

Q Was it exactly the same, the same position, the same duties?

A Yes.

Q Same functions. Do you know, sir, of your own knowledge, whether or not desk audits were done of these appellants by personnel of the United States Civil Service Commission?

A Well, I think they were, because I have seen the log, as I mentioned, when we get an appeal, my classification clerk used to log it in, and that log would indicate the data received and other information, including whether a desk audit was made and the date of the desk audit usually, so I have seen that, and from what I have seen, it indicates to me, to my memory, anyway, that we did make audits.

MR. ROTHSTEIN: I would move to strike the answer, your Honor, as not responsive. I asked if he knew of his own knowledge whether or not such audits were made.

THE COURT: He says from he he has seen, those were desk audits. Isn't that his own knowledge from what he saw?

MR. ROTHSTEIN: He seems to remember seeing a log of some kind which we don't have before us.

THE COURT: Why don't you ask him about the log?

Q Mr. Friedman, is that your statement you just made your conclusion based onsome documents you have reviewed at some point subsequent to the appeals in '68 or is it based on your own recollection of the fact that audits were done by the Civil Service Commission?

A Well, I don't have a very clear recollection of that '68 appeal, the group appeal in '68. But after I saw the log, that sort of jogged my memory. And if the log said that we made audits -- and also I saw the letters of decision that we wrote after the '68 appeal, and they indicated audits, and those two pieces of information to me would be a pretty clear fact, to my mind, that I had made audits -- that somebody made an audit.

Q When did you see these logs that jogged your

memory?

A I saw them in Mr. Adams' office.

Q How long ago?

A About a week or two ago.

Q You, sir, have no independent recollection of any kind, do you, whether or not audits were made?

A Not really, no.

MR. ROTHSTEIN: I would move to strike the witness' answer as speculation.

THE COURT: Motion denied. That always happens when you refresh recollection from something.

The witness has said that except for the logs, which jogged his memory, he wouldn't remember it, he has no clear recollection. But with the logs he now remembers it.

Have I stated what you told me?

THE WITNESS: Yes.

THE COURT: The lawyer is saying that even with the logs you don't remember the audits. Is that the fact? Or is it the fact that with the logs you do remember the audits?

THE WITNESS: Well, I don't remember any specific audit, only the fact that we made them.

BY MR.ROTHSTEIN:

Q How did you make them? How were they made?

A Well, as I say, I don't remember the specific audits. But I'm saying we made them because there is information in the case that we did. And we would make them the same way as we did the first group.

Q Do you know who did it?

A It would be indicated in the log, again.

Q Do you remember of your own knowledge at this point who did the audits?

A No, sir.

Q Do you know how long they took?

A No, sir.

Q Do you know where they took place?

A At the Immigration Office.

Q Do you remember that or do you just conclude that based on the fact that audits were done?

A Well, an audit would mean, by very definition it would have to be, at the work site with the appellant. So it could only be at the Immigration Service.

Q Isn't it a fact that you were merely inferring from the use of the word "audit" in the opinion letters that such audits were in fact done at the Immigration Service, the same way they had been done in '66?

A No, sir.

Q But you remember nothing at all about how the audits were done, who did them, who was spoken to?

A No, sir. I don't.

Q Why is it, Mr. Friedman, you remember so clearly what happened in 1966 but not what happened in 1968, two years later?

A I don't know. One reason may be is that it was a much larger group, that the first group sort of got etched in my mind a little deeper than the second group, which was sort of anticlimatic, so to speak.

Q Do you remember at that time having a conversation with a Mr. Opolion, one of the general investigators who had appealed?

A The name seems familiar, but I couldn't recall having an interview with him or anything of the sort.

Q Do you remember having a conversation with any of the appellants in which that appellant expressed dissatisfaction at the fact that audits were being done by the Immigration Service and not by the Civil Service Commission?

A I recall one such incident. I couldn't recall the name of the employee. But I know it happened,

because I did get there -- I couldn't recall whether it happened on a telephone call to me from this appellant or whether it happened when I was in the Immigration Service, speaking with him or with someone else and it came over. But I recall the incident.

Q Well, to the best of your recollection would you tell the Court everything that was said by this disgruntled investigator and by youself, either on the telephone or in person?

A Well, he indicated that the Immigration Service was making a survey or review of his position and other positions and that they wanted to interview him, to make a desk audit and he refused to speak with any representative of the Service, he didn't think they would do right by his job; he felt that he wouldn't get the kind of treatment that he wanted by speaking with the Service representative and he would much rather speak to a Commission representative.

Q Mr. Friedman, I would like you to take a look at Exhibit B, pages 112, 113, and 114, which consists of a request by the Immigration Service to the Civil Service Commission for more time to conduct audits in connection with the appeal. I ask you to read through those three pages and I will then ask you if this refreshes your recollectio

at all about what happened during the period.

(Pause)

A Yes. What happened was that when we received this second group of appeals we treated them the same as we do other appeals. I mean, we log them in and send the letters of acknowledgment to the appellants at the agency, and we requested certain information from the appellants and the agency, and one of the important pieces of information which we would ask would be an evaluation by the agency of that position, telling us how and why they arrived at the present classification.

And if the Service, the Immigration Service, didn't feel they had an answer for us, if they had an evaluation that was current which we could accept, so they decided to review those positions by surveying them at that point.

Q Did they send to you the results of their audit?

A I don't have any recollection of that. If we were asking them for an evaluation of the positions then they might have done it by sending us a copy of the results of their survey or by individual evaluations for the appellants involved. But I couldn't tell you which

way it was.

Q But you are certainly not ruling out the fact that they might have sent in the audit results of what they had done.

A That's right.

Q Sir, I would like you to look at Exhibit B, pages 18 to 22, which is the same exhibit you have in front of you, and I ask you if this refreshes your recollection and if you now remember receiving the audit results which are contained in those pages from the Immigration Service.

A No, it doesn't refresh my memory. It is still the same. I just have no recollection of having seen a report or survey report.

Q Do you still believe or remember that the Commission made its own audit of these appellants?

A Well, other than the information that I mentioned I saw, which seemed to indicate to me pretty positively that we wouldn't say in our letter of decision that on the basis of an audit we come to a certain conclusion -- we wouldn't say that unless we made an audit.

Q Isn't it possible that the word "audit"was predicated upon the audits done by the Immigration Service which were sent to you?

A We would so indicate in the letter of decision, and we haven't shown that, we haven't said that.

Q I ask you then, sir, how you account for the fact that the audits which were done by the Immigration Service are part of the administrative record in this case but the results of the audits done by the Commission, which you feel were done, are nowhere to be found in this record which was certified to the Court by the Civil Service Commission.

A You mean the notes of the audit?

Q Whatever documents --

A What administrative record do you mean?

Q Well, you see before you the results of the Immigration Service documents. I ask you why the administrative record does not contain similar results of the audits which you believe were done by the Civil Service Commission.

A Well, the only record of those audits would be in the notes that the classifier took, whether it was I or the other classifiers, and this would be the only record of the audits.

Q Why wouldn't those notes be preserved and made part of the administrative record?

A I really can't tell you.

Q No answer?

A No answer.

MR. ADAMS: He just said he couldn't tell you.

THE WITNESS: Well, that's my answer, that I couldn't tell you that, I couldn't answer that.

Q But yet the results of the audits done by the Immigration Service were preserved, they were made part of the record and they were certified to this Court by the Civil Service Commission.

A This was Washington, now. I don't think that our office in the region preserved them. I don't think we had this record. This is from the Commission in Washington, and I couldn't tell you what they retained and how long they retained them. Apparently they retained something. But our office did not, here in New York.

THE COURT: Are you about through or do you have some more?

MR. ROTHSTEIN: I have one area to go into and I'll be through within five minutes.

THE COURT: I'm not rushing you. I just want to know whether you want the witness for a length of time.

MR. ROTHSTEIN: No. I think it will just be about five to ten minutes.

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THE COURT: Have you got any cross examination of this witness at this stage of the proceedings?

MR. ADAMS: Your Honor, a very short one. I might suggest that I had prepared a lengthy direct examination --

THE COURT: I'm not interested in any of that, Mr. Adams. The only question I'm interested in at the moment is, the reporters have been working without a break for the whole morning and I'm prepared now to give them a recess if this thing is going to go on .

MR. ADAMS: I was going to suggest, your Honor, that I think Mr. Rothstein has covered most of what I intended to cover. If we want to take a break, I would shorten my cross examination. I would make sure I wasn't going to be repetitive. I do think I have about ten questions, but certainly no more than that.

THE COURT: Well, go ahead,then.

Q Mr. Friedman, in the course of the evaluations wich you did of the investigators in New York, and I'm referring to all of the evaluations, in the course of them did the occasion ever arise where work which an employee claimed could be of a GS-12 caliber was removed from him by the employing agency prior to the audit which was done by you?

A Yes, there were cases like that.

Q Do you remember any specific occasions?

A No, sir.

Q Does the name Joseph D'Amico refresh your recollection?

A The name sounds familiar, but I couldn't recall the events that are associated with that name.

Q When such occasions did arise, and you testified that some did, what policy on how you would treat the work that was removed prior to the audit?

A Well, if they weren't a part of the employee's current assignment, we didn't give much weight, we couldn't consider them. We had to consider what was actually in the appellant's assignment.

Q Just so I can understand the policy, the rule that you applied to the situation, will you tell me if this is a correct statement of what you would do?

Assuming that an employee had a case that he believed was a GS-12 level case, that he was working on for a majority of his time for a period of a year. He filed an appeal. You then made an appointment to audit him, and ten minutes before you walked into the room to look at his cases management removed the case from him.

I ask you if that situation, under the policy which you applied, would or would not have considered that case a part of his current work loan.

A If it happened ten minutes before the audit, I would consider it as being part of his work load.

Q If it occurred ten minutes before. Suppose it had been taken away the day before you audited him?

A Well, when I made the audit, I tried to give the employees the benefit of the assignments they had had at the higher grade levels. I wasn't trying to take anything away from them, obviously.

And if they had had some graded 12 assignments up to very close to the time of the audit, they would get credit for that.

Now, what happened in fact was that even though we would give them credit for that higher grade assignment, and even if we recommended a higher grade based on that, the agency would have roughly eight weeks time within which to put our decision into effect.

During those eight weeks many things could happen. One of them would be the agency would decide to change the way they assign the work, and at that point they could take away the grade 12 assignments.

So, regardlessof what we did based on what

he did up to the time of the audit, this wouldn't necessarily result in a grade 12 for the appellant. The agency still is within its management prerogatives to take away that assignment and the employee wouldn't have the grade 12 work any longer.

Q Are you saying, sir, that under the policy which you were applying, if work which an employee had been working on at the time of his appeal was removed, it still should have been considered?

A I'm trying to recall what we did and I think we would give him credit for that work.

Q This would be the proper thing to do, then?

A That's the way we would do it.

Q To give him credit for work removed.

A If it was a question of the removal up to the time of the audit.

MR. ROTHSTEIN: May I have just one moment, your Honor?

THE COURT: Would you like to go over and check your notes and pick up at 2:00 o'clock?

MR. ROTHSTEIN: I think that might be a good approach.

THE COURT: All right. We will recess now for lunch until 2:00 o'clock.

take (Luncheon recess)

1 p.m.

AFTERNOON SESSION

2 p.m.

S A M U E L F R I E D M A N, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. ROTHSTEIN:

Q Mr. Friedman, before the lunchbreak you testified that in the case of work that had been removed from subsequent to appeal but prior to the audit, that full credit was given for the work taken away.

THE COURT: What he said -- you know I don't like this business of amplifying a witness' statement inadvertently or otherwise. I think what he said was that he attempted to give credit where the removal was reasonably contemporaneous with the time of the audit.

Now you have added something else, full credit. I don't understand what full credit means. I took it the other way. I took it that th. witness did not take away from a man a case that contemporaneously had been removed from his control .

Now let's keep within the framework of the testimony.

Is that substantially -- did I repeat substantially what you have said, in substance?

THE WITNESS: That's right, yes, your Honor.

THE COURT: All right.

Q Well, Mr. Friedman, maybe what would the cut-off point be in time as to when you would give credit for a case taken away when you wouldn't have?

A I recall, I think I would stick within a few months, a month or two of the audit date, the audit time.

Q Well, what would determine a cut-off point, when you say a month or two, is there a rigid rule or is it just how you felt about a particular man's work?

A No, there wasn't any rigid rule and it wasn't how I felt about any particular man's work or individual. If I took one approach, I would apply it to all of the appellants whom I was considering, whose appeal I was considering.

Q Did the Commission have any official policy vis-a-vis giving credit for work that had been removed following an appeal?

A No, sir.

Q I would like to direct your attention to Plaintiff's Exhibit 1, which is a letter from Alvin W. Norcross, Acting Director of the Bureau of Inspections, to Mr. Kenneth J. Stallo, Director of Personnel of the Immigration Service, and I invite your attention to the next to the last paragraph on page 3, in which Mr. Norcross states "When matter such as maldistribution are acted on only when an employee files an

appeal based on a long period of time performing a higher grade work, equity is not served, because it denies the employee pay for work assigned from or with the consent of management."

And I ask you, based on that statement, was it not the official policy of the Commission not to give any credit at all for work which has been removed from an employee following his appeal, but prior to his audit?

A There was no such policy, and I don't read that policy in the sentence that you read or paragraph you read.

Q How do you interpret the statement that it denies an employee pay for work assigned from or with the consent of management? How else could it deny him pay except by the denial of his appeal?

A Well, what this means simply is that if an agency is going to manage its work in such a way that it assigns duties to employees and those assignments result in certain grades, and if upon review the agency finds that those grades would not be what they really had in mind in terms of the management of their function, they should take steps to rearrange their duties, to rearrange the assignments so as to get the kind of organizational structure and the kind of work assignments they would like, but they should not wait until the thing comes to an appeal.

This is what it means. What Mr. Norcross is

actually saying there is why do you have to wait until an appeal is filed before you organize your work the way you want it.

Q And your testimony is that there was no official Commission policy then, it was just the way you felt about a particular situation?

A Well, there was no official policy and there was no feeling, it was a matter of judgment as to how much credit to give and how far back, and having come to that kind of conclusion, that kind of a judgment really, I would apply the same thing to all the appellants.

Q You tesitifed this morning, Mr. Friedman, that you made a mathematical computation in 1966 to determine whether or not fifty-one percent of time was spent by the appellants on GS-12 work. Is that a fair characterization of your testimony?

A Yes. I tried to arrive at that computation, yes.

Q Was such computation designed to take into account all of the man's work?

A I'm not sure I know what you mean by "all of the man's work." All of his cases?

Q All of his cases.

A Yes.

Q What period of time did you look at, how far back did you go in evalutating the man's work load in order

to apply the majority time rule?

A I think I started out with the premise of about six months, six months. And then I found in some situations that some cases had been taken away so that the time span would have been a little longer than that, and I extended it, so I think roughly I used almost a year as a period, nine months to a year as the work timeframe within which I consider the cases.

Q Did the timeframe vary from appellant to appellant?

A No.. No, I applied the same frame.

Q Didn't you just say that you started with a six-mon . concept and then you expanded it in certain cases?

A To all -- I expanded it to include all of the appellants. I did not apply six months to one or more appellants, then nine months to another appellant.

Q When you started gathering information from the appellants, how far back did you go in determining what the case elvel was that they were working on?

A Well, I used about a nine-month period.

Q A nine-month period?

A Yes.

Q How many cases were involved on the average in a nine-month period?

A I don't know. It varied. Some had large numbers,

others smaller numbers. I really couldn't give you a figure.

Q Would you say that fifty cases would be about the average, in that order, more or less?

A I can't tell you. I don't know.

Q It is your testimony that you made a mathematical computation based on each and every case that was assigned to each and every investigator?

A Yes. I considered each of the cases within that timeframe and I tried to arrive from their diaries, the assignment dates and completion dates and how many hours had been spent on each of these cases, to arrive at my figure for the time.

Q How many cases would you say you considered in toto?

MR. ADAMS: I object. He is trying to get around the question that has already been answered twice and he doesn't understand, he doesn't know.

THE COURT: He may answer this one. Do you know with any mathematical certainty or approximation, how many cases of that kind you considered?

THE WITNESS: No, sir. I really couldn't answer that.

THE COURT: All right.

Q Well, could you approximate it at more or less

than a thousand cases?

A Less than a thousand.

Q Less than a thousand cases.

Now, you have testified this morning that you have computed into this mathematical formula, annual leave and sick leave that had been taken by the investigator during the period that you were considering, is that correct?

A That's right.

Q How did you determine how much annual leave and/or sick leave each man had taken over the subject period?

A By asking them.

Q When did you ask them this?

A During the audit, the desk audit.

Q So it is your testimony that you asked each man whom you audited how many days of annual leave and how many days of sick leave he had taken over the nine-month period you were considering?

A I would say that I considered it in each case and I would have gotten that information at some point during the discussion or the interview with each appellant.

Q Do you remember asking questions to that effect?

A I do not remember that. No.

Q So then you are just assuming that if you got it you would have gotten it during the interview?

A Well, it is more than an assumption. I would get it -- this would be the only place I would get it or the only time when I would get it would be during the interview. I did not consult any records in any personnel office, if that is what you mean.

Q In the event that you neglected to ask a man how many days he had taken of sick and how many days he had taken of annual leave, is it your testimony that you would not then go to the personnel folder or ask the Immigration Service to go to the personnel folder and tell you how much time the man in fact had taken?

A To answer the second part of the question first, I did not go to the personnel office or to the administrative office to inquire about the leave record of any one appellant.

I might add, in some of the cases it wasn't too pertinent, the leave record wasn't too important, because the nature of the cases were obviously not grade 12 calibre to me, so it didn't matter whether there was a little extra time or less time, they wouldn't add up to a majority time, you see. Or if there was any question, I had to get that information.

Q When they told you how much time they were spending annual and sick leave, did you put that information in the notes that you took?

A I don't recall that. I couldn't say.

Q Mr. Friedman, if they gave you information regarding the number of days they took off, and you entered the figure in the computation, you did have to write it someplace, did you not?

A Yes, sir.

Q And it is your testimony that you don't know whether you put it down with the notes you were taking at the time of the interview or whether youwrote it somewhere else?

A Oh, no. I would have it in my notes. If I took the information, as I said, in some cases I wouldn't have to delve into that area because it didn't make any difference because the caliber of the cases weren't Grade 12.

But if there was a question of coming up with a percentage of time that was valid, pertinent, I would make a note of it someplace, and this would have been in my notes, yes.

Q Didn't you tell me this morning that you computed a percentage of time in all cases?

A Yes.

Q Are you changing your testimony now to say that you only did it in certain cases, when you believed cases to be of a Grade 12 caliber?

A Let me amend that by saying I did the computation where they were essential to determining the grade. If it was not essential, if it made no difference in terms of percentage, I didn't.

Q Just so the record is clear, you wish to change

the statement that you made this morning that you made computations in each of the 52 cases and to now testify that you only did it in cases where you thought there was a question?

MR. ADAMS: I don't think that is what he said.

MR. ROTHSTEIN: Yes, it is.

THE COURT: I don't want any discussion between the lawyers.

You object?

MR. ADAMS: Yes, I object.

THE COURT: Overruled. I'm not overcome by any forensics, you know. There is no jury sitting there.

A I think I am getting a little bit of semantics here. I did come to a calculation in each case because I had to do that in order to determine if the employee, the appellant, was spending a majority of his time on Grade 12 work.

What I said then was that I didn't devle too deeply into the leave question where it wasn't too appropriate, too pertinent. But I would still have the percentage of time figured out in some way to tell me if there was a majority of time being spent on Grade 12 work.

Q Are you saying you arrived at exact percentages in each case or you didn't arrive at exact percentages in

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each case?

A I did.

Q You did. I ask you, sir, how in the world it is possible to arrive at an exact percentage of time worked at any level of case based on the hours that the man has told you if you don't know the total number of hours that the man was on the job during the relevant period? How is it possible to make any kind of accurate calculation without that information?

A I would say that I got that information in every case where there was a question of whether there was a majority or not, a majority of his time or not.

Q Are you now saying that there were certain cases where you made no exact calculation and just determined that Grade 12 work was being done for less than 50 percent of the time?

A No. I have to go back again. I did make a calculation at some point so I could arrive at a determination of whether the employee was spending a majority of his time on Grade 12 work.

And to arrive at that I must have used all the information I could get, including the leave.

Q But you just testified, Mr. Friedman, that you didn't have the leave information in all cases. Is

that correct?

A In some cases I didn't.

Q So that in those cases your percentage determination could have been totally inaccurate, could it not?

A It would be accurate in terms of the majority or not the majority.

Q How could it be, Mr. Friedman? If you were looking at a nine-month period and you found that a man spent a certain number of hours on GS-12 level work that you calculated to be, let's say, 40 percent, how could you know that was accurate without knowing whether or not the man had been sick for two months or whether or not the man had been on annual leave for a month or whether or not the man had taken leave without pay or been given administrative leave or been away from the job for any reason which would have diminished the total number of hours which you used in determining the percentage of Grade 12 level work?

How could you do that without knowing how much time the man had taken off?

A If it was a 40 percent or more question, I would have a problem without the leave, and I did get the leave in those cases. I'm talking about cases where

I examined the case load and in my judgment it didn't look like there was more than ten or fifteen or such small percentage of time on Grade 12 work and, even if I gave him credit for all the leave, it wouldn't build it up more than at, well, ten percent or fifteen percent, it would still be far away from the majority.

And that's why it wasn't too pertinent to get the exact figure on leave, because it wouldn't raise it up to a majority under any conditions.

Q Do you know if you got that information from Mr. Kavazanjian, who you interviewed in July?

A I think I did.

Q I would like you to look at Exhibit F, again, your notes, and show me where in the notes you indicated how much leave Mr. Kavazanjian took.

(Pause)

A This would be the same problem we had before with the figures on the case load, where I wasn't able to find any time breakdown in these notes either, is that right?

I don't see any reference to it in these notes.

Q You stated before that if you had had asked such questions they would have been in your notes, the

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responses would have been in your notes, wouldn't they?

A Probably, yes.

Q Now, at the time you saw Mr. Kavazanjian, had you determined yet whether you were going to apply the majority or the substantial time rule?

A Yes. I would apply the general rule, which would be the majority rule, yes.

Q So that is it true then that at the time you did the interview with Mr. Kavazanjian in July that your mind was closed on the issue, that you were applying the majority time rule and not the exception provided in the Commission's guidelines?

MR. ADAMS: Your Honor, we have had considerable testimony on this. I object.

MR. ROTHSTEIN: I am going to relate it to what the witness just testified to.

THE COURT: I have asked you gentlemen not to discuss your purposes, intents or portents. The objection is overruled.

A My mind was not made up. I was only using the general rule, as I mentioned this morning I would in any appeal in the absence of the criteria for an exception to the general rule.

That is, the majority rule would apply, and

this was the position that I had or the approach that I had. It wasn't anything new or different or biased on this appeal.

Q When was your mind absolutely made up on the issue of which rule was going to be applied?

A It was not a question of my mind being made up. It is like asking me when did I decide which standard I had to use. If there is an appropriate standard, that's what I have to use. And if there is a guideline or a guide, a rule which says the majority time is what governs in mixed grade positions, I would have to use that.

So it wasn't a question of making my mind up.

Q Didn't you testify this morning that there was also an exception and that part of your determination would be whether the general rule or the exception was to apply under the facts and circumstances in New York?

Is that a fair characterization of your testimony this morning?

A I would have to determine when it might be applicable to apply the exception, yes.

Q Is it correct then, based on your testimony, that all through these audits there was still a chance that you might be applying the substantial time rule?

A No.

Q At what point did you rule out the exception?

A Almost at the beginning of the appeal, because the nature of the operations in the New York office, the size of the office, the nature of the function, was such that the conditions or the criteria which might be applicable to an exception wouldn't apply.

Q So that you ruled it out before you even spoke to all of the appellants and found out from them what they did and how it related to the total picture in the office, is that correct?

A It is not quite that way. In the absence of any specific information or organizational structure of the agency which would lead one to make an exception, there wouldn't be any basis for me to use other than the majority time rule. It wasn't a question of making my mind up. It is like applying something which exists. There is the rule you have to follow.

Now, if there is going to be an exception, I have to find this out. And the audits were to help me do that.

But I'm not saying my mind was made up that there could not be an exception under any conditions.

Q At the time you spoke with men whom you did

not ask what or how many days they had taken of annual and sick leave, is it fair to say that with regard to those men you had determined that his substantial time rule could not be applied no matter what?

A Well, I wouldn't say "no matter what." The nature of the assignments there, the nature of the office, the size of the office and the way the work was assigned didn't seem to me to lend itself to use of the substantial exception to the majority rule.

Q By not determining the amounts of annual and amounts of sick leave, did you in effect make it impossible for yourself to apply the substantial time rule?

A No. The leave was used only where it was pertinent. And if there were situations where the percentage of time on Grade 12 work was so little, the leave, whether I include it or excluded it, wouldn't have changed the percentage by very much.

Q When you say "a little," do you mean by fifteen percent, in that order?

A Ten, fifteen.

Q So couldn't that fifteen percent easily have become 25 if a man had told you that he was out of the office three months out of the nine months? Is that mathematical possibility?

A It could. But that wouldn't change the use of the majority time rule, which was still applicable.

A But my question is, by not getting that information, you made it impossible for yourself to apply the substantial time rule.

A No. What you are asking me to do is to trace through the process of arriving at a judgment, and I consider many things in doing that. And I considered the kind of cases and the time and kept in mind the fact that I had to apply the criteria and the standards, and also that the majority rule was applicable, and I didn't just take a time figure, a percentage and mathematically figure it out like you would on a slide rule. It wasn't that kind of an operation.

You had to consider the total function, the total job, the total setting in which the job operated, the way the assignments were made, the way the office was organized. I did all those things, not at one time, but I considered all those things and then I arrived at a conclusion.

Q Mr. Friedman, do you know of any authoritative sources in the field of Civil Service who recommend the utilization of the substantial time rule in all mixed grade positions?

A You mean to eliminate the majority time rule?

Q To use the substantial rule at all times.

Q Well, I don't know of any authorities. But there are many writers in the field who think that a position should be classified on the basis of the highest function, the highest grade function performed regardless of time.

This is more so in the blue collar trades, where there are quite -- well, I think most union agreements would include such a provision, that you have to compensate the employees if they work out of title, at a higher title, if they perform a higher grade, a higher pay function you have to pay them at the higher pay.

This is true of the blue collar trades, it was true of the Post Office system, and in many parts of the private employment sector this is true.

But in the federal government, as far as the positions under the Classification Act go, the Civil Service Commission's policy is still the same and no authorities have recommended any changes that I know of.

Q When you say there policy is the same, that is, the policy which does permit for classification based on substantial time.

A As an exception. As an exception. It makes

a difference whether it is an exception or whether it is the practice.

Q What purposes are served by the utilization of the substantial time rule, in terms of the items of Civil Service policy?

A I think I mentioned this morning that in some small offices, where they don't have more than one or two employees with the qualifications they need to perform the higher level work, they would be handicapped if they didn't have this one or two employees available with these higher skills and higher qualifications to carry out the higher grade functions.

Q Is it also a rule designed to prevent the exploitation of employees by management under a system where work is carefully assigned so that no one employee has 51 percent of his time spent on GS-12 cases and so the agency can reap the benefit of having all of its GS-12 work done without paying anybody at GS-12 level?

A Well, that's a possibility, and the rules are not designed merely to prevent exploitation, if you want to use that term, of that sort. There is recourse under the Classification Act for appealing the classification if an employee feels he is being exploited and given higher grade duties without being recognized by a higher grade.

Q If, in an office as large as New York, management assigned work so that no one has more than 50 percent and the employee appeals to the Commission and the majority time rule is employed by the Commission, what redress does the exploited employee have?

THE COURT: Why do you call that exploitation?

MR. ROTHSTEIN: It is exploitation in the sense that, if there is a GS-12 in a standard and if management assigns work so that nobody has a majority of time, they are getting the benefit of having their GS-12 work done without having to pay anyone for either having the qualifications to work for GS-12 level or for working there, which I think in our opinion circumvents the purpose of the law and the purpose of the standards.

THE COURT: All right. You can argue that in your briefs. But that's a social philosophy and not the administration of the classification system.

Q Mr. Friedman, is it true that the Civil Service Commission oversees the classification program which any federal agency puts into effect?

A Yes.

Q And how do they go about this supervision, overseeing?

A Well, in the Classification Act, which I said

delegates to the agencies the authority to classify its positions, there is a provision there which provides that the Civil Service Commission will review from time to time the manner in which the agency is exercising its authority.

And the Commission does this by making an inspection, by visiting the agency, inspecting the classification program. And they do it indirectly through the appeals procedures too, where the employee appeals, and this is sort of a check on the agency.

Q But there is a supervision independent of the appeals provision, is there not?

A Yes. That is the inspection process.

Q Now, this morning I asked you about the upgrading which was done by INS as a result of the audit done in the spring of '67. I directed your attention to Exhibits N, M and P, showing people with certain percentages which were under 50 percent who were upgraded, and you responded, saying in effect, and I don't want to mischaracterize what you said, but I believe the effect was that that was the agency's business, they could do what they wanted to do, it had nothing to do with an appeal.

Was that in effect, in essence what you said? And if not, could you correct that?

A No. I said that the agency in exercising its authority to classify positions, and also using its authority to determine how to make assignments, had to determine that this was the way they were going to make assignments, first:

These cases will be assigned to such and such employees.

And then also they decided that it would be to their advantage management-wise, it would help their function, to set up some Grade 12 jobs and use the substantial time rule where they felt they had an appropriate exception to the majority rule.

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Q You have characterized what they did as the application of the substantial time rule, then?

A That's right.

Q Do you know whether this was done with the knowledge and approval of the Civil Service Commission?

A The Commission wouldn't have to approve it, and they wouldn't have to have the advance knowledge because the agency was acting within its own authority under the Classification Act.

Q But it is true that the Commission did have a role in these particular promotions, did they not, based on the document I showed you this morning in which your name appeared as having been consulted?

A They would have a role after the fact, on an inspection which might occur any time after the reclassifications.

MR. ROTHSTEIN: I have no further questions.

THE COURT: What I would like to know is at the time that you were doing the audit of Mr. Kavazanjian, did he at any time tell you that he had been away from his duties for any significant period or that he had been out sick or that he had been taking his leave rather than working on government business?

THE WITNESS: I don't recall that offhand, your Honor.

THE COURT: If there had been any significant absences from the job such as posed by counsel, where somebody was away for two or three or four months, as he indicated by one of the early questions, would you have expected the man that you were auditing to have told you, "I am sorry, my record doesn't have a lot of work to show for it, but I was sick for two or three months;" would you have expected that volunteered information?

THE WITNESS: I think this actually came up in a few instances. I wouldn't expect it, but I think it did come up several times.

THE COURT: Now suppose the situation as posed by counsel, you had this meeting with Mr. Kavazanjian in June, you say, of '66, suppose the only work that he had done was about two weeks' work in January and it was all grade 12 work so that one hundred percent of his work was grade 12.

Would he have been entitled under any concept of classification to a grade 12 classification?

THE WITNESS: No, sir.

THE COURT: Why not?

THE WITNESS: We would have to have had to apply some logic there, and not give a grade 12 for one month or two months' work at the grade 12 level out of the year. We would hold that in abeyance and not take any action on it, to

change it, until such time as there was a better picture of the assignments.

THE COURT: So what you were doing was appraising his overall performance rather than any fraction of the period?

THE WITNESS: In effect, that's right.

THE COURT: Mr. Adams?

MR. ADAMS: Just a few questions.

CROSS EXAMINATION

BY MR. ADAMS:

Q Mr. Friedman, does the Civil Service Commission have any responsibility or authority to direct an agency to assign work to particular people and not to other particular people?

A No, sir.

Q How many classification appeals, individual appeals did the regional office in the New York Civil Service Commission have on an average, per year, during the 1960s?

A Oh, roughly about two hundred a year.

Q Was it your responsibility to adjudicate or assist in the adjudication of the majority of those appeals?

A Yes, sir.

Q How many of those appeals, if you know, Mr. Friedman, did you as a matter of Commission policy apply anything other than the majority time rule?

A None that I know of, offhand.

Q You testified, Mr. Friedman, that you have had interviews ranging from an hour or more, possibly as low as forty-five minutes with all of the individual appellants with the exceptions of those done by Mr. Hayden and Mr. Scheinin.

Were there any other people you interviewed with respect to the types of cases assigned to the appellant investigators?

A I spoke with the supervisors of the appellants. I spoke to every supervisor there.

Q You have also testified, Mr. Friedman, one of the pieces of information you were seeking to ascertain at these interviews of the investigators was how long or how many hours or how many days an investigator had spent on a particular case. How did you ascertain that information?

A Well, each of the appellants as far as I can recall kept a diary which showed the cases they were assigned, and on the diary it showed when the case was assigned, and when it was completed, and I tried to ascertain from the appellant for the period between the assignment and the completion, how many hours they had spent on that case.

Now, this was a statement by the appellant, of course, because they had more than one case to work on simultaneously.

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Q As a general rule, did you accept the estimates of the hours or days spent given to you by the investigators?

A Yes, sir.

Q Mr. Friedman, what kinds of questions did you ask in attempting to ascertain from the investigators what types of cases they were working on?

A Well, since the criteria in the standards covered the complexity of the cases I had to ascertain that, and I did this by asking the appellants to tell me what made the case complex, what made them difficult, what made them involved, and the criteria spoke in terms of cases involving conspiracies involving national impact, so I explored those areas with the appellant, and I had the standards with me and the appellants were informed of the critera, they were shown the standards, so they knew what I was after, and the questions were all towards ascertaining that sort of information.

Q Mr. Friedman, I believe you have described the process of adjudicating classification appeal as one of collecting information and then making an evaluation.

Once you had collected all of the information, how did the evaluation, how did you go about making the evaluation?

A Well, I would take all the information I had in my notes, plus all the information I had collected which were in

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my mind of course, more than the notes, and then I would compare that information against the criteria in the standards, and then I would interpret the information against the standards, against the criteria in the standards, and then I would arrive at a conclusion, and evaluation and a judgment of what the grade was.

Q When you say what the grade was, you mean what the grade of the various cases were?

A No. The overall grade. Well, I suppose you do it piecemeal. I would arrive at a judgment of the value of the cases, and then add them up in terms of time, yes.

Q You have referred to a log. I am handing you what has been marked as Defendant's Exhibit MM for identification and ask you whether you can identify that.

A Yes, sir.

Q Is that the log to which you referred in your testimony this morning?

A Yes, sir.

Q What information -- can you just generally describe the type of information, not the actual information, but the type of information that is contained in that log?

A Well, this serves as a reference for any action which occurs on an appeal after we get it, so we have the name and the agency and the title, the present classification, and the action taken on it, the final decision that we

make, what the classification is, and also indications of when it was received and if we made an audit, there was a column for that and we put down either the initials or the date or both, as to who made the audit and the date.

THE COURT: Does that have the relevant information for Mr. Kavazanjian?

MR. ADAMS: I believe it does.

THE WITNESS: It should.

THE COURT: Would you just read it across. I would like to get something by way of dates here.

MR. ADAMS: It is page 86 or 87, Mr. Friedman. There is an entry for Mr. Lazrus plus thirty-nine or forty-one others, plus an entry for Mr. Kavazanjian and some others.

THE COURT: Give me the heading of each of the entries across the way, and the dates involved, please.

THE WITNESS: All right. Yes, sir.

The first column has a number. I think this is the number of the appeal for that year. And this is number 66.

Then the name, Jack T. Lazarus, and 39, 41, 42 and others is the figures.

Next column --

MR. ADAMS: May I clarify, your Honor? there are two entries. He is reading the one for Mr. Lazarus. Do you

want that one or both?

THE COURT: It doesn't many any difference. All I want is -- I would like to have Kavazanjian first.

MR. ADAMS: That is on the next page.

THE WITNESS: Yes, sir.

The number is 61. Edward Kavazanjian and eleven others. That is the first column.

The second column is headed "Agency and Location." This shows you his Immigration and Naturalization Service, in New York.

Present Classification is the next heading. And the entry is "General Investigator, GS-1810-11."

The next column is the date received, it looks like July 6th, '66.

And then there is a clip here I have unfasten.

The next column I think is headed "Audit." Let me see another page to make sure. Oh, I'm sorry. It says "Received," and the next column is "Acknowledged", when we acknowledged the appeal. And the entry is 7/15/66.

And then the next column is headed "Audit" and we indicated, the entry says, "Yes" under that column.

And then, as part of the same audit it shows the initials of the one who audited the position, and this has "S.F." as the entry, and that would be me.

The next column is headed "Correct Classification." That means our decision, our classification. And this is, the entry says, "General Investigator, GS-11 and GS-12."

This was because we made it 11, it had been changed, it was changed later by the Civil Service Commission in Washington.

The next column is the date, closed, and this shows February 1, 1967.

And the last column is headed "Remarks," and there is an item here, says: "Listed as 48 single appeals including J. Lazarus and group."

That is the end of the listing.

THE COURT: Is there any indication there of when the appeal was filed from the decision?

THE WITNESS: Yes, sir. The date received, the appeal, was July 6, '66.

THE COURT: No, I'm talking about an appeal from your -- from the Civil Service determination.

THE WITNESS: Let me see if there is an item and when we sent it to the Commission for Lazarus.

(Pause.)

Yes, under the Lazarus entry, the last column on the remarks, listed as "48 appeals," includes the Kavazanjian group, which is the same, and then it says, there is a name

here that is not familiar to me at all, it says Alma Warner to CAO -- that would be the Central Appeals Office, the Classification Appeals Office, in Washington; June 9, '67, so our office apparently sent it down to Washington on June 9, 1967.

Q June 9 was the date of the decision of the Washington office.

A Was that it? Well, I don't know.

THE COURT: Is there any place that indicates when a notice of appeal was filed and when the file was transmitted?

THE WITNESS: It is not in here. On some of the other entries for other appeals where we sent them to Washington, there is an entry when it went to the CAO and the date, but it doesn't show for Kavazanjian or Lazarus.

THE COURT: Tell me about the others.

THE WITNESS: For example, here's one, a man named Henry Masland, he was a management analyst officer, and downgrading was the result of our action, then it went to BAR, that is, to Board of Appeals and Review in Washington, and it says 11/4/66, and it was returned 11/30/66.

Then it went to the Classification Appeals Office December 2, '66, and it was finally adjudicated by the Central Office January 4, '67.

THE COURT: What I don't understand is, I

thought that from the examination by counsel for the plaintiff that all the fifty-four cases were decided at one time and thereafter appeals were taken to Washington.

It looks here as though some part of these cases were sent to Washington, one in November of '66, which was before the February date that has previously been referred to.

MR. ADAMS: There is nothing in the log that shows that, your Honor.

THE COURT: It says "Date closed, February 1, '67."

MR. ADAMS: Date closed, that is the date of the Regional Office decision.

THE COURT: You couldn't appeal to Washington until it was closed in the Regional Office?

MR. ADAMS: That's correct.

THE COURT: All right. But you had a file sent to Washington in November of '66?

MR. ADAMS: Where does that show?

THE WITNESS: It is not on the log.

MR. ADAMS: I don't know where that shows up in the log.

THE WITNESS: Oh, I am sorry, I was giving you an example of the kind of entry which we would have which was missing from Kavazanjian and Lazarus' files. I was showing

you what we do usually enter that way and I was reading one illustration.

THE COURT: That is not part?

THE WITNESS: No, that is just an illustration of another appeal.

MR. ADAMS: Not involved in this case.

THE COURT: I will tell you what was running through my mind, I was just wondering what happened to the missing notes, whether they were forwarded as you would forward a case from the Court of Appeals down to the Supreme Court, what you do is you send the whole record down to the government printing office or to the clerk of the Supreme Court, and if you start looking around for a file up in the clerk's office on the 17th floor, you might find a scrap here and a scrap there, but the factual file is gone on to the next jurisdiction.

I would like -- I was trying to tie this in. Mr. Kavazanjian testified that he went around looking for his file on March 1st. I want to see just what the relationship is of that date to anything that occurred, to see whether he could have gone around on March 1st and also whether he could have seen the notes.

MR. ROTHSTEIN: In reply to your Honor's question, it might clarify matters to look at page 18 of Exhibit A,

which shows the letter of appeal of those, whose appeals were denied, and it is dated March 16, 1967.

THE COURT: That doesn't help me very much on when the file was available.

MR. ADAMS: Your Honor, I just refer to page 54 of Exhibit A. It is a letter to Senator Case from Mr. Schulkind, and on the bottom paragraph of page 1 they mention the number of disappointed appellants that have appealed further.

"...this Bureau may in its discretion reopen and reconsider national office decisions. We are acknowledging Mr. Lazarus' telegram which you forwarded, as a request to reopen and reconsider his case. We have asked" -- (in the past tense) -- and that letter is dated February 21st -- "the Region to forward its file on the case."

THE COURT: That makes it as though --

MR. ADAMS: It is circumstantial, your Honor.

MR. ROTHSTEIN: Except, your Honor, it refers to his case in the singular as if it is one case, Mr. Lazarus' case, not the fifty-two appeals.

MR. ADAMS: I think the letter refers to a number of appellants.

THE COURT: Well, whoever put these files together certainly did not exercise chronological discretion.

MR. ADAMS: I won't disagree with that.

THE COURT: All right.

BY MR. ADAMS:

Q Mr. Friedman, where was that log kept?

A It was kept by my classification clerk, that was the official title, my secretary, and she kept it on her desk.

Q Was it the regular course of business of the Civil Service Commission Regional Office to keep this kind of log?

A Yes.

Q Was that particular log that is marked MM for identification, kept in the regular course of the business of this Regional Office?

A Yes, sir.

Q Were the markings of that log made to reflect transactions or occurrences at or shortly after the time the transactions occurred?

A Yes, sir.

MR. ADAMS: Your Honor, we would offer MM into evidence. This has not been duplicated and Mr. Rothstein has not had an opportunity to read it.

MR. ROTHSTEIN: May I have a minute or two to study this? I have never seen it before. I am at a total loss to know what is in it.

JGjw 1 Friedman - cross

THE COURT: Let me ask you this question, Mr. Friedman.

Was there a visitors' register when a man came in to look at his file? Was there some kind of a visitors' register kept? How would I go about checking up whether one of these plaintiffs came up to look at his file and on what date?

THE WITNESS: At this point there wouldn't be any way of checking that at all.

THE COURT: He didn't have to sign in?

THE WITNESS: It was informal.

THE COURT: He didn't have to sign for the file?

THE WITNESS: Well, we gave it to him right there. We gave him a desk to use right in our office.

THE COURT: Was there anything that he signed, like a library slip?

THE WITNESS: No, sir. It was kept very informally.

THE COURT: All right.

MR. ADAMS: On this point, I would just refer your Honor. Youmentioned that Mr. Kavazanjian testified around March.

There is a letter in the record, in Exhibit E, dated May 5th, signed by Mr. Kavazanjian, that says,

"Today I have tried to examine my file."

So I think there may be a question as to the date.

THE COURT: I was mindful of that when I asked about the others, because he also testified that he was there about March 1st. And since it happens to be nine years ago, there could be a small mistake in date.

(Pause)

MR. ADAMS: The letter I was referring to from Mr. Kavazanjian is at page 22 of Exhibit E.

(Pause)

THE COURT: There is no question but that on May 5th, 1967 the matter was down in Washington, wasn't it?

I say Kavazanjian's matter was in Washington on May 5th.

MR. ADAMS: The regional office did nothing more after February 1st. That was their decision. I don't think there is any question, your Honor.

THE WITNESS: I would say yes, it was down in Washington at that point.

MR. ROTHSTEIN: Your Honor, I do not object to this because technically it does come within the shop book exception. Ido note, however, that it certainly was

the subject of our discovery requests and I think plaintiffs are somewhat prejudiced by seeing it for the first time now while the witness is on the stand.

THE COURT: Received without objection.

(Defendant's Exhibit MM for identification was received in evidence)

BY MR. ADAMS:

Q Mr. Friedman, I want to show you Page 109 of Exhibit MM, DX MM, and ask you to refer to entry No. 130.

Does that entry refer to an appeal by general investigators in the Immigration Service taken in 1968?

A This shows Martin R. Greenfield and fourteen others, Immigration Service Investigator, received June 10th, '68, and acknowledged June 18th of '68.

Q Does that log indicate whether or not audits were made of those investigators?

A It shows, under the column "Audit," the date 10/11 -- 10 and 11/68. I suppose it took two months for the whole group. And then it shows my initials, SF, which would indicate that we made audits during October and November and that I made them.

Q Now, Mr. Friedman, I want to show you a copy of Exhibit B in evidence. I'm showing you page 8.

Could you identify what that page 8 is, what

it purports to be?

A This is a letter -- this is our letter of decision on an appeal of Mr. Costas.

Q Do your initials appear anywhere on that letter?

A They are on the top. They have my initials on the top of the letter.

Q Does that letter refer to a work audit?

A No, sir.

Q A classific mistake.

A I'm not too clear there. I don't see it.

Q I am referring to the second paragraph of that letter (indicating).

A Oh, yes. I'm sorry. Yes. It states, "Our decision is based on a review of the material submitted to you and your agency. Consideration of the information was secured during a work audit of your position," which to me would indicate we made a work audit.

MR. ADAMS: Thank you. We have no further questions.

THE COURT: All right. Is that all for Mr. Friedman?

MR. ROTHSTEIN: One or two questions.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q One further question, Mr. Friedman.

At the time of the audits which you did in 1966, were there any instances of men who attempted to show you files which you declined to look at?

A I can't remember any such instances. It might have happened if it was explained to me that the case was similar to another case which I may have looked at at the same time or during the audit and then I would not have felt it necessary to review that particular case if it was similar to one I had looked at before.

But I can't think of any specific instances where I did say I wouldn't see the file.

Q Is it your recollection that you would look at any file which a man wanted to present to you, with the exception you mentioned just now?

A Yes.

MR. ROTHSTEIN: No further questions, your Honor.

THE COURT: Thank you very much. You are excused, Mr. Friedman.

(Witness excused)

THE COURT: Next witness.

MR. ROTHSTEIN: Plaintiff would call Mr. Publio Esperdy.

P U B L I O E S P E R D Y , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Esperdy, during which years were you District Director of the New York District of the Immigration Service?

A From 1959 to 1970.

Q And will you briefly outline the function of the District Director, what the job entails?

A He has general supervision over the programs of the Immigration and Naturalization Service in the New York District, which includes the inspection of arriving passengers in the United States, the adjudication of various applications made by immigrants and non-immigration for adjustment of status, student status, change of status, and the investigation of illegal practice by lawyers or individuals, the arrest and apprehension of aliens, the naturalization of aliens, and the general administrative work of the district.

Q Would it be correct to say that as District Director you were, in effect, the boss of the New York District?

A Correct.

Q As the head man, were you familiar with the work practices in the investigations unit in New York?

A Yes, I was.

Q During your tenure as District Director, to your knowledge did supervisory investigators ever go out in the field to perform investigations?

A On a very limited basis, very limited, because they had their tasks cut out for them as supervisors and they couldn't devote their energies to field investigations.

Q So that would you characterize it as a rare instance when an investigator or a supervisory investigator would actually handle a case himself?

MR. BARTH: Your Honor, I object. The witness has already characterized that prior answer.

THE COURT: Well, he now wants to know whether it was a rarity.

It is the same as asking,"How was it, a half foot? Or would you characterize it as six inches?"

You may answer.

A I am afraid I lost it.

THE COURT: It just makes two questions for one.

THE WITNESS: Would you ask the question again?

THE COURT: It has its points as emphasis, maybe.

Q Whether or not you considered it a rare occurrence for supervisors to actually perform investigations.

A Yes, it was a rare occasion.

Q Now, you were familiar, were you not, with the fact that the Civil Service Commission was handling classification appeals in 1966 and 1967?

A Yes, I was.

Q Following those appeals, did you make any recommendations regarding the work being performed by investigators who had their appeals denied by the Commission?

A Yes. I agreed to review the cases of all investigators who had appeals to the Commission and who had failed in getting their grade classified upwards.

The matter had been brought to me in several discussions with the union, the employees' union. I personally felt that some of the men had considerable merit in their appeals, and therefore I invited all of the investigators who wished to do so to bring to my attention a resume of their work which they believed entitled them

to a Grade 12 classification.

This was done with the understanding that I had no authority to make the reclassification, nor could I overrule the Civil Service Commission or our central office.

However, I did obtain the consent of the Civil Service Commission and of central office to go through with this preliminary step, which I did.

A number of the investigators submitted their requests to me, outlining what cases they had worked on, how long they had worked on them, the type of case and so forth. I sent for all of the files. I reviewed most of them. Some I didn't have to review because I was personally familiar with the cases. I interviewed their first line supervisors and their second line supervisors, and at the conclusion I made the recommendation in, I think it was, six cases that the jobs should be reclassified upwards.

Q Do you know what recommendations you made in the case of Mr. Reilly, one of the investigators?

A No, I don't remember.

Q Do you remember the recommendation you made in the case of Mr. Sena?

A I am afraid I don't remember him. It has been

some time ago.

Q Do you recall the recommendation you made in the case of Mr. Burke?

A Yes. I recall Mr. Burke's because there was some slight difference in his case. He also was entitled to a Grade 12 classification because of his activities as a supervisor, in addition to his field work.

Q Mr. Swift -- do you remember your recommendation there?

A Swift?

Q Or Mr. Rowland.

A No.

Q Do you remember the total number?

A I think there were approximately -- you mean that submitted their resumes to me?

Q The total number who you believed were entitled to Grade 12.

A About six. It could be five. Five or six.

Q You stated that you had obtained the consent of the Civil Service Commission to do this.

A Yes.

Q Why did you feel that you needed such consent?

A Because Ihad no authority to proceed further in the matter.

Q Why did you go to the Commission for approval rather than to the Regional Office of the Immigration Service?

A Well, I went to both the Civil Service Commission and our central office in Washington.

Q Was it true that during this period of time the Commission was exercising general supervisory authority over the reclassification program of the Immigration Service?

A Yes.

Q Then how did this authority manifest itself?

A Whose authority?

Q The authority of the Civil Service Commission, how did that manifest itself?

A Well, they from time to time came to the office, they made field inspections, and went into the regional office in Burlington and reviewed the files there, the personal files, which were kept in Burlington.

Q For the record, my question refers to authority --

A They talked to me.

Q Right. My question, sir, refers to the authority of the Commission separate and apart from classification appeals. Is that how you intended your

answer?

MR. BARTH: Your Honor, I object. I think if there is confusion Mr. Rothstein should re-ask the question.

A Well, I had no authority at all to classification at that grade level. The District Director in New York did not have classification authority.

Q Well, let me rephrase the question, as counsel suggested.

During this period of time was the Civil Service Commission exercising general supervisory authority over the classification program administered by the Immigration Service separate and apart from their jurisdiction to decide classification appeals filed by employees?

THE COURT: How should he know? He wasn't part of the Civil Service? How would you expect him to answer that question.

MR. ROTH: He was part of the Immigration Service, a very high official.

THE COURT: I know. But you asked him whether the Civil Service was doing something. You are not asking him for his function. You are asking for some other agency's function.

MR. ROTHSTEIN: I am asking whether his agency was being supervised by the Civil Service Commission.

THE COURT: He told you that his agency was being inspected. Now you are throwing another word in there which has connotations to it and you are asking him for the activity of another agency and its purpose.

MR. ROTHSTEIN: What I am trying to do is clarify --

THE COURT: I don't think you are clarifying anything. He told you he had no reclassification authority.

Who did have the authority to reclassify?

THE WITNESS: The Civil Service Commission and the central office of the Immigration Service.

THE COURT: And where was the central office of Immigration?

THE WITNESS: Washington, D.C.

MR. ROTHSTEIN: No further questions, your Honor.

THE COURT: Any cross examination of this witness?

CROSS EXAMINATION

BY MR. BARTH:

Q Do you recall approximately how many GS-11 investigators asked you to review their files?

A It has been a long time, but I would guess about no more than eighteen.

Q Mr. Esperdy, was a case ever taken away from a GS-11 investigator for the purpose of defeating his classification appeal?

A No.

MR. BARTH: No further questions.

REDIRECT EXAMINATION

BY MR. ROTHSTEIN:

Q Was a case ever removed from a GS-11 investigator immediately following the filing of classification appeal by him?

A Well, I believe that there were some taken away. But immediately -- I don't know whether it was immediately. But it was taken away as soon as it was ascertained that the case was in the 12 category and should not have been with the 11, under outstanding instructions.

Q Were there cases that you were aware of where the removal of work was precipitated by the filing of a classification appeal by the employee?

A No.

MR. ROTHSTEIN: No further questions.

THE COURT: Thank you very much.

A I am the Deputy Director of the United States Immigration and Naturalization Service in Buffalo, New York.

Q How long have you been Deputy Director in Buffalo?

A Since 1971.

Q When did you first start working for the Immigration and Naturalization Service?

A In April of 1963.

Q What positions did you hold between 1963 and 1971?

A I was hired in the administrative division of the Washington Central Office of the Immigration Service.

During my first year or two I held various trainee positions, working in the administrative field, personnel branch. And then concentrated about in 1965, in Classification.

In 19 -- late 1966, from -- to the beginning of 1967, I was appointed the Chief of Classification and continued as the Chief of Classification until my appointment in Buffalo.

Q What were your duties and responsibilities as Chief of Classifications for the Immigration Service?

A It was my responsibilitiy to provide program guidance and police the classification system as directed by the Civil Service Commission through the Immigration and Naturalization Service, which included classifying the 7,000 jobs that made up the Immigration Service.

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Q Where was your office?

A In Washington, D.C.

Q Is that the office which has been referred to here as the Central Office of Immigration?

A Yes, it is.

Q Are there any files that are contained at the Central Office which relate to classification matters or personnel matters?

A There are numerous files that are retained there.

Q Do you have any duties and responsibilities with the content of those files?

A At the present time? None whatsoever.

Q At that period of time?

A Yes. They were under my custody. They were a part of the Classification Section of which I was in charge, so they were within my custody.

Q Are you familiar with those files?

A Yes, I am.

Q Prior to 1967, to whom were the most complex and delicate investigations assigned?

A The more complex of the grade 12 investigations were assigned by directive from the Central Office to supervisory grade 12's.

Q Were there many cases that fell into this most

complex and delicate category?

A There were not in our judgment at that time very many cases and that was the basis on which we decided that they would be assigned to the supervisory 12's.

On hindsight of course we have found out that there were many more cases than we assumed there was.

Q Prior to 1967, how did the Immigration and Naturalization Service ascertain that the method of assigning the most complex and delicate cases to the GS-11 general investigators was being carried out in the field?

A To the GS-12 general investigators. The more complex -- we depended on instructions that went out periodically from the highest levels initially which stated that the more complex of the grade 12 investigations would be assigned to the supervisors.

Additionally, of course, we had the benefit of Regional classification people who had more touch with the field installations than we did to provide us with any information they had gleened or had seen. We got statistical reports and case reports of investigative work that came into the Central Office which came through my office, and which were reviewed.

Additionally, we had inspections that were conducted by our own field inspectors, the departmental field inspectors,

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and personnel practices, and ultiamtely the Civil Service Commission, of course, conducted an inspection of our personnel practices which also fed reports to us.

Additionally, we had what we referred to as the Whitten review which required that each supervisor in any field installation review annually the position descriptions of his subordinates, and certify that the duties and responsibilities described in that position description were actually being performed by each employee.

Q During a Whitten review what would happen if the employee disagreed with the supervisor's judgment as to whether or not the job description was accurate?

A We provided for a statement of differences to be appended to the position description that was submitted to the Regional Office, and on the statement of differences the employee was to indicate his view of what he had been doing or what he felt was not correct.

Q Have employees ever been reclassified after a Whitten review?

A Yes, they have been.

Q I believe you mentioned, Mr. Ferro, that various agencies periodically reviewed your classification proceedings. What agencies would that have been?

A Well, the mother agency of the Immigration

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Service is the Department of Justice, and they had their own internal personnel inspection dividion, which came out periodically and inspected our personnel policies, and the Civil Service Commission of course, which had the responsibility to do that.

Q Did the Civil Service Commission conduct periodic review of the Immigration and Naturalization Services prior or 1967?

A Yes, they did. As far as I know they have always conducted them periodically. The last one I can remember was in 1964, that is the earliest one I can remember is 1964.

Q How do you know that that review was conducted?

A Well, it was something that I worked with and worked from. It was maintained in my office, it was something that would generate work for me, for my section.

MR. BARTH: The government has Exhibit NN marked for identification. This has already been supplied to counsel.

Q Mr. Ferro, I'm handing you Government's Exhibit NN for identification. Can you identify that exhibit?

A Yes, this is the Civil Service Commission's nationwide report of July 1964 transmitted to the then Attorney General, Nicholas D. Katzenbach, from Mr. John Mazey, who was then Commissioner of the Civil Service Commission.

MR. BARTH: Your Honor, I would like to point out

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that Mr. Rothstein has advised me that although we did give him a copy of this July '64 report, he doesn't at least recall receiving the covering letter.

Do you have any difficulty with it?

MR. ROTHSTEIN: Now having read the covering letter, I have no objection.

MR. BARTH: Stipulated into evidence.

MR. ROTHSTEIN: Stipulated into evidence.

THE COURT: All right, received with no objection, NN.

(Defendant's Exhibit NN, received in evidence.)

xxx

Q Do you know how that, how the Civil Service's 1964 review was compiled?

A Well, I assume it was compiled as they have compiled every other one I am familiar with, which is a compilation of inspection reports by various Regional offices of the Commission of our field district, which are then fed into Washington, into the Civil Service Commission, from which they issue that report.

MR. ROTHSTEIN: Your Honor, I object. I believe I heard the witness say "I imagine." If I heard correctly, I would object on the grounds that the witness is speculating.

THE COURT: Read the last answer, please.

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(Answer read.)

THE COURT: Strike out the words "I assume," and I will take the answer merely as a statement of routine.

MR. ROTHSTEIN: I would object also your Honor, on the ground there has been no predicate that he is familiar with what the Civil Service Commission does.

THE COURT: I am not accepting it as a statement of what happened. I am merely accepting it as a statement of what the routine was. Whether it happened on this occasion we don't know yet.

MR. ROTHSTEIN: I respectfully assert that he hasn't testified that he is even familiar with the routine of the Civil Service Commission.

THE COURT: Are you familiar with the routine?

THE WITNESS: Thoroughly.

THE COURT: Thoroughly?

THE WITNESS: Thoroughly, to the extent of this question.

THE COURT: What was the routine in connection with this question?

THE WITNESS: The routine in this question, in connection with this question, is how do they normally conduct an inspection and feed it to us of those that I was familiar with. And as a matter of fact, I have participated in these

inspections with the Civil Service Commission and what is normally done is that they go out on fact-finding missions from their various regional offices to the field offices of the Immigration Service and write reports for those field offices which then are sent to their Central Office and compiled and given to the Immigration Service in one report.

THE COURT: All right. Next question.

Q Did the Central Office receive such a report with regard to the New York District Office in 1963?

A Yes, we did.

MR. BARTH: I am showing the witness Exhibit O in evidence and I am asking him if that is the Civil Service's report to the District Director in New York with respect to their preparations for the 1964 annual, periodic report?

THE WITNESS: Yes, this is the New York Region of the New York Civil Service Commision's report of their inspection of our New York District Office which was sent to the New York District, to our region in Burlington and also to us.

Q Was there a period I can review of the service's classification proceeding by the Department of Justice prior to 1967?

A Yes, there was. The last one I remember was in 1966.

Q Are you aware that a number of GS-11 investigators

appealed their classifications to Civil Service in mid 1966?

A Yes, sir, I am.

Q About how many appealed?

A Approximately fifty employees of the New York District Office appealed their classification at that time.

Q What were the results of this appeal?

A Well, they appealed initially to the New York Region of the Civil Service Commission and initially I believe about a dozen grade 11 investigators were certified at grade 12 by the New York Region of the Civil Service Commission.

The balance were found to be properly classified and I believe one was found to be over-classified. Then that same group or the balance that did not get reclassified, reappealed to the Central Office of the Civil Service Commission, and I believe in addition a number of about ten were upgraded from the Central Office of the Civil Service Commission.

Q Prior to this upgrading by the Civil Service Commission, was the view of the Central Office that the GS-11s were not doing GS-12 work?

A Yes, it was the view of the Central Office that they were not doing grade 12 work.

Q How did the Service find out about the upgraders in 1967?

A Well, we received a notice from the Civil Service Commission in New York advising us of their findings.

MR. ROTHSTEIN: Would the witness speak a little louder please? I am having a little difficulty hearing.

THE WITNESS: Yes, I will.

Q Do you know approximately when you received this notice?

A In February, I believe of 1967. We received notice from the Civil Service Commission, I think simultaneous with notice to the appellants, of their decision.

Q What did you do after you received this notice?

A Well, I reviewed the decisions to the extent that I could, and the same day I believe a meeting was held in the office of the Associate Commissioner of Management with the Director of Personnel and the Associate Commissioner of Management and the Assistant Commissioner for Investigations, and we discussed -- initially I was asked whether the decisions could be reversed and I indicated that perhaps in one or two cases I thought they could be reversed .

They asked me what the ramifications of the decision were, and what I thought of them, and I pointed out that obviously there was much more grade 12 work being performed in New York City than we had assumed, at least by the liberal interpretation, or the more liberal interpretation being taken

by the New York Region of the Civil Service Commission and equally obviously our supervisors were not doing the grade 12 work.

Q Was there a plan of action formulated at this meeting?

A Yes. At that same meeting we decided to conduct a nationwide review by the interpretation that we now had by the Civil Service Commission of what was grade 12 work. So we called in or intended at that time to call in our four regional classification people, and the Assistant Commissioners for Investigations in each of the regional offices, and have a conference with a view to discussing and uniformly applying the criteria that we now had for grade 12 all over the Service.

Q How was this survey carried out?

A These teams that came in from the regional offices went back out, made up again of a personnel man or classification specialist, and the head of investigations for each regional office and they were instructed to go out and to advise each of their field installations that they would be making a site visit and that any investigator who believed he had any grade 12 casework whould make his cases available to them and make himself available as they would be coming in to sit down with them and review their cases, to make this

determination as to how much grade 12 work there was in a given office, and they did that.

They went out to each district office, and reviewed the work loads and the work of each employee to determine first of all how much total grade 12 work there was in an office, and whether any employees who were now grade 11s were spending a majority of their time on grade 12.

Q What was the result of the 1967 survey?

A The ultimate result was an establishment of approximately forty-five grade 12 investigator positions in addition to those that had already been set up.

Q How did the Immigration Service determine that an investigator should be reclassified to a grade 12 level? What criteria were used?

A Strange as it may seem, we used the same criteria as the Civil Service Commission. However, we didn't always come up with the same decision. We got the facts of the cases by reviewing the casework and then determined by a relative comparison to the classification standards which cases were at the grade 12 level, and then compiling the total amount of time spent for work performed, identified the proportion of the individual investigator's time at the higher grade, and then on that basis we classified or not the individuals.

Q Were those individuals who your survey found performing the majority of Grade 12 work upgraded?

A Yes, they were. Those persons who were spending the majority of their time on the higher level work were reclassified to Grade 12.

Q Were there any individuals who were spending less than the majority of their time on Grade 12 work that were upgraded?

A There was. In the study we, of course, found -- as I indicated, we were looking for two things. We were looking, first, for the individual who was spending a majority of his time on Grade 12. He was reclassified.

Additionally in the survey we were looking for the total amount of Grade 12 work in the office, to insure that we had an adequate number of Grade 12's.

As a result, there were several persons, of course, who were found to be performing less than 51 percent of their time at Grade 12 work, which, in an office where one compiled this total amount of less than 51 percent, would indicate a need for additional investigators.

So we had on our hands, for example, in an office like Los Angeles, two or three individuals who were clearly to be reclassified by virtue of their having spent more than 50 percent of their time on Grade 12 and

several individuals who were spending a minimal percentage, up to 30 or 35 percent, on Grade 12 who would not be reclassified.

But, as we had identified their Grade 12 work, we had to in some fashion provide an adequate number of investigators to perform that work.

So what we did was we contacted the Civil Service Commission in Washington and proposed to them that in an office where we had enough Grade 12 work to warrant additional Grade 12 positions, that we compile all that work together and identify the number of positions we needed and then reclassify the individual in that office who had the highest percentage of Grade 12 work but less than 51 percent.

And that's what we did. The Civil Service Commission wrote us back and said yes, that was a fair way to do it, and we did that.

It resulted in, for example again in Los Angeles, three or four investigators who had less than 51 percent being assigned to new positions that were created that gave them more than 51 percent, and they were reclassified.

Q You mean those who were doing less than their majority work on Grade 12 work. So, after they were

upgraded, in fact wasn't the work consolidated then? Weren't they performing the majority of their work?

MR. ROTHSTEIN: I object to the leading nature of the question, your Honor.

THE COURT: Sustained.

Q What else did the Service do after the 1967 appeal to improve its classification program?

A Well, it was obvious that we hadn't had the touch with our field installations that we would have liked to have. So we began recruiting for additional personnel people and we put out several instructions, hoping to clarify what was a horribly confusing classification standard to everybody who had to deal with it.

So we provided instructions to our first line supervisors and to our regional people, including the classification people, on what was a Grade 11 case and what was a Grade 12 case, hoping that in the additional assignment of work, everybody would understand what was a Grade 12 case and what wasn't a Grade 12 case.

Q Was there an appeal by the GS-11 investigators in the New York office in 1968?

A Yes. There was a smaller number, a smaller group, numbering 11 or 12, who also appealed to the New York Region of the Civil Service Commission.

ggjw 4 Ferro - direct

Q What role did the Immigration Service play with respect to this appeal?

A The same as we had in the past, perhaps a more detailed one, though. We were contacted by the New York Region of the Civil Service Commission and asked for our input into their review of the position. So we decided we would send a classification specialist from the central office and a classification specialist from Burlington who had jurisdiction over New York to desk audit the appellants' positions.

And we did that. That is, we didn't desk audit the positions; we reviewed the cases of the positions, but in many instances, I think in all instances, the appellants would not sit down with us and discuss the job.

So our classification people reviewed cases and talked to supervisory people and came back and wrote their analysis and their evaluation and then furnished it to the Civil Service Commission in New York.

Q Did you review that submission to the Civil Service Commission?

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Q Can you identify that?

A Yes, sir. This is our transmittal letter to the Director of the New York Region of the Civil Service Commission transmitting our findings in the 16 appeals that were before us at that time.

Q Do you know what the result of the appeals by the investigators in 1968 was?

A Well, the appellants ultimately, I believe, were all denied higher grade, retained in grade. But a by-product of that study resulted in the establishment, I believe, of three additional Grade 12 positions in the New York office, and that's the result, in this instance, of our classifier coming back with his findings on the individual cases but, again, fidning enough work load in the cases that he reviewed to recommend the establishment of additional positions.

Q How were these positions filled?

A They were filled competitively by the merit promotion and reassignment plan.

Q Why wasn't the method of upgrading that was used in the 1967 survey used also in promoting the three GS-11 investigators in the General Investigations Unit in 1968?

A Well, the normal way of filling a position

would be the way they were handled in the latter instance. The required special permission from the Civil Service Commission to do what we did in the '67 survey, and the reason was that, well, had we done anything else in the '67 survey, had we, for example, announced those positions and filled them competitively, the Immigration Service has a nation-wide promotion system.

That would have meant, for example, in Los Angeles, very likely bringing in four or five positions from Chicago or Buffalo, or people from Chicago or Buffalo who were high in the promotion list to positions into Los Angeles- thus displacing the work from the men we had in Los Angeles.

So we needed a special way of handling it at that time because it involved so many people. And while in New York in the latter instance we had vacant positions, we had the opportunity not to displace work and not to cause people not to have anything to do, specifically, so we could announce the three vacancies and fill them competitively.

Q Did the natreu fothe case load of those who were upgraded in Los Angeles as a result of the 1967 survey change when they were promoted?

A It changed before they were promoted. We

established the jobs and then promoted the men who had the next highest percentage but less than 51 percent.

Q Did the percentage of Grade 12 work that they were performing increase after they were promoted?

A Yes. Because when we established the jobs and put them into it, there were already those jobs. We were dealing with jobs at that point. Those jobs were Grade 12 positions and hopefully they would be spending the majority, if not all of their time, on Grade 12, but certainly a majority of their time.

MR. BARTH: No further questions.

MR. ROTHSTEIN: Your Honor, may I have about a ten minute recess before cross examining this witness?

THE COURT: All right.

(Recess)

Take7 p.m.

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CROSS EXAMINATION

BY MR. ROTHSTEIN:

Q Mr. Ferro, you were familiar, were you not, with the fact that in 1959 a standard was promulgated by the Immigration Service which governed the classification of investigators employed by the Service?

A Familiar to the extent that when I came to work in 1963 a standard did exist dated 1959.

Q And did that standard provide for a GS-12 level?

A Yes, it did.

Q Is it your understanding that the Immigration Service was required to implement that standard by promoting those who were performing the GS-12 level?

A If you mean we were required to promote, to make Grade 12's, certainly not. But if you mean we were to recognize the case work that was identified at grade 12, and the standard as being grade 12, yes. A standard is a bench mark, and it is only a bench mark. There is no requirement to arbitrarily or any other way set up a certain number of positions.

Q Do I understand your view, the policy of the Immigration Service, that if an employee were performing at GS-12 level for a majority of his time, that there was no

requirement that he be made a GS-12?

A No, you don't understand that from my view.

Q Explain it for me.

A Yes. If a man is performing for a majoring of his time at a given grade level, that is the classification his position shuld have.

Q What steps were taken to determine in 1963 which employees were performing at the GS-12 level?

A Well, initially, the most siginficant step was that the higher echelons of the Immigration Service by directive on numerous occasions directed that in field offices grade 12 cases would be assigned to supervisory grade 12 investigators. That coupled with our normal reporting processes and the inspections conducted by the Department of Justice, the Civil Service Commision, the Whitten review where each supervisor annually certifies under law that the position description of his subordinate is accurate, by review by our regional classification people, which are the standard processes in a classification system.

Q Based on those steps, can you state whether or not the people in the Central office who were in charge of classification actually believed that all of the GS-12 level work was being performed by supervisors?

A I can state categorically since I was in charge

of the classification system from January of 1967 that I believe the supervisory grade 12 investigators were performing all of the grade 12 investigative work.

Q Did you receive any allegations to the contrary from any of the investigators in the New York District or elsewhere?

A No. We received only letters -- I can recall that we hadn't recognized the amount of grade 12 work and our response in each case was we were aware of the grade 12 work and it is to be assigned to the supervisor investigators.

Q In June of 1965 did you receive at the Central Office a submission prepared by Mr. Kavazanjian indicating to you the kinds of cases which were being performed by GS-12 level -- GS-11 level investigators?

A Addressed to me?

Q Addressed to the Central Office, to the people --

A I don't recall itspecifically, but I do recall that the American Federation of Government Employees had written our Service about grade 12 work.

Q And do you remember what they said about grade 12 work?

A I don't remember specifically, but it was on the question of whether we should set up some grade 12 positions.

Q Do you know if they asserted that they were in

fact performing at grade 12 level?

A No, I don't recall that.

Q You don't remember?

A No.

Q Do you remember if Mr. Kavazanjian filed a classification appeal within the Immigration Service in 1963 or 1964?

A Yes, I'm fairly certain he was one of those who filed in the initial group of forty-eight or forty appeals to the New York Region.

Q I am referring not to the appeals to the Commission, but a classification appeal filed within the Immigration Service in order to obtain a GS-12 level.

A I believe he was -- I'm not certain -- I believe he was one of those who appealed initially to the Service.

Q I'd like you to take a look at Plaintiff's Exhibit number 4, if you would, which is a memorandum from Mr. Loughran to Mr. Kavazanjian, subject, classification appeal. I ask you whether that refreshes your recollection at all about what transpired.

MR. ROTHSTEIN: I am showing the witness my copy.

A I'm not sure of your question.

Q I ask you whether that refreshes your recollection

so you might relate more about your recollection of what happened vis-a-vis the attempt by Mr. Kavazajian to become upgraded under the 1959 standard.

A I am not sure because this seems to be more general than that. This says that in the first sentence, this is in response to your letter to the Commissioner concerning grades of investigators.

Now, whether this was also tied in to his individual appeal, I can't tell from this letter. This looks like a general inquiry about the grades of investigators to which the Associate Commissioner Management is responding that we are working with the Civil Service Commission to clarify the standard, and hopefully their report and recommendations will be received some time in the spring, so it doesn't look like his appeal is being responded to here.

Q Does that refresh your recollection at all about what the investigators were doing as a group to attempt to be upgraded on the standard?

A Well, I'm not sure -- I am aware, if you're asking me am I aware in 1964, that a group of investigators are doing something, no, not in 1964. So I don't tie that into this letter.

Q In other words, you remember exactly what the Immigration Service was doing, but you have no recollection

of what the employees of the Immigration Service were doing within the service to attempt to obtain higher grades?

A Well, I know about the individual letter coming from the AFGE, but I don't know about any groups that had formed and raised this question at that time, no.

Q You don't have any recollection of seeing the material which was submitted through the AFGE which compared investigative positions in INS to investigative positions at other agencies?

A No, I don't recall that.

Q Are you saying that it didn't cross your desk or --

A I say I don't recall that.

Q I ask you this:

There is reference in there to waiting for a report from the Civil Service Commission. Do you know what report that letter refers to?

A No, I don't. I don't know specifically what it refers to.

Q What is the date on that letter?

A March 20, 1964.

Q Do you know whether, as of that date, the Immigration Service was in fact waiting for any report from the Civil Service Commission?

A No. As I indicated, I reported for duty in April of 1963. I would have eleven months on the job, and as a trainee I probably wouldn't have known the policy in 1964 as it specifically related to the response to this.

Q Well, didn't you testify on direct examinaton about the Gooege report that was received in 1963?

A I don't remember testifying about any Gooege Report received in 1963.

Q Well, let me show you Exhibit 5. Weren't you shown this on direct examination?

A OH, yes. To this I made reference that this was a typical report that was received periodically from the Civil Service Commission, and this was one that was conducted at that time, to which you asked me how I knew the Civil Service Commission followed this method, etc., and I said it was cypical of the kind we had subsequent to that date.

Q In other words, on direct examination you testified in depth regarding a report issued in 1963, but yet 1964, when I ask you which report from the Civil Service Commission was the ImmigrationService waiting for as indicate in Plaintiff's Exhibit 4, you say you would have no knowledge of what report that would have been?

A Perhaps you misunderstood me, Counselor, and perhaps I didn't make it clear. I said the 1964 report I was

familiar with because as Chief of Classification in 1967 I would have had that report and any other report in my immediate access. I do not recall specifically the findings as it took place in 1963, the Gooege report as it took place in 1963. I do recall it as a report that I have worked from subsequent to that 1963 date.

Q Do you have any knowledge of whether or not prior to 1967 the Immigration Service Central Office actually believed that supervisors were performing field assignments ?

A I'm sorry, I think I misunderstood you.

Q Do you have actual knowledge of whether prior to 1967 the Immigration Service Central Office believed that supervisors were performing grade 12 field assignments?

A Yes, I have actual knowledge that the Immigration Service insofar as I as representative of the classification staff knew that supervisors were performing the grade 12 investigative cases.

Q When did you join the classification staff again?

A Initially I was assigned to the division in April of 1963, and about in 1965 I began concentrating in classification.

Q Now, Mr. Ferro, you testified about the extensive efforts which were made by the Immigration Service in 1967 through a field audit to determine who was doing the higher

level work. I ask you, is that the audit that was conducted by Mr. Augustine?

A I think Mr. Augustine was a member of one of the survey teams.

Q And I ask you whether any such survey was conducted on a nationwide or other basis by the Immigration Service prior to 1967?

A No, sir, it was not.

Q In other words, this was the first time that it was done?

A Well, it was the first time that survey was done, yes.

Q When you say that survey, was any similar survey done when representatives went around --

A No, no survey of that nature was done to my knowledge. No survey was done during the time I was attached to classification like this survey.

Q And you relied entirely on information that came up through normal channels, is that correct?

A Normal channels being any number of things which I previously listed.

Q That was the same information which led you to believe that supervisors were performing the grade 12 level assignments?

A That's right.

Q Did the 1967 survey show that?

A No, the 1967 survey showed quite the contrary. That supervisors were not doing the grade 12 work and the interpretation that had been made by the New York Region of the Civil Service Commission reflected indeed we had much more grade 12 work than we ever dreamed.

Q Was the Immigration Service persuaded or directed to conduct such a survey in 1967 by the Civil Service Commission?

A No, sir, that survey was an outgrowth of a meeting that took place the day we received the New York Region's decision.

THE COURT: How much more do you have, Mr. Rothstein? Do you have any estimate of time that you can give me?

MR. ROTHSTEIN: Probably another fifteen or twenty minutes.

THE COURT: All right, we will recess in this case until tomorrow morning.

Is that convenient for you?

THE WITNESS: No, sir, it isn't. I have a plane to catch at 7:45, without being presumptuous.

THE COURT: All right, then we will just recess

for fifteen minutes while I take this plea and clear out these people.

THE WITNESS: Thank you, your Honor.

(Recess taken.)

CROSS EXAMINATION CONTINUED

BY MR. ROTHSTEIN:

Q Before the break I was asking you whether or not the nationwise audits which were done by the Service in 1967 were done at the request or the urging of the Civil Service Commission, and I believe your answer was no, that they had been undertaken independently, is that correct?

A That's correct.

Q Sir, I would like to direct your attention to DX P and Q in evidence. DX P is a letter from the Civil Service Commission to Mr. Loughran, Associate Commissioner of Management of the Immigration Service, dated February 15, 1967, which says, in the last paragraph on that page:

"Therefore, we believe that it will be important for you to use the decisions on the positions in the New York District Office as a pilot and determine from classification review which investigators in other district offices are performing at the grade GS-12 level. In this way recognition can be given through reclassification of the positions, where this action is warranted."

I also direct your attention to Exhibit Q, which is a letter February 17, 1967, with the same file

number references on it, in fact the file number is in the first paragraph of the letter, saying that it is in response to Exhibit P, which says, in pertinent part:

"A program of measuring the effect of this decision on remaining like positions in the Service has been undertaken with the utmost priority."

I ask you if, based on these two documents, you wish to change your answer to the effect --

A No. As a matter of fact, what I would like to do is point out to you that this is a time when the Immigration Service and the Civil Service Commission were in agreement as to what we should do, and that's all it represents.

If you are suggesting that the February 15th letter caused us in a day and a half or two days to undertake and then respond to this, that is not true. We immediately upon receipt of the decision had a conference and decided what the decisions meant and how we would go about doing it, and we certainly didn't have to wait for the Civil Service Commission to tell us to do that. We knew what the ramifications of that decision were and we had decided unilaterally, though this would indicate the Civil Service Commission agreed with what we proposed to do.

Q Is there anything in that letter which you sent back in response which indicates that you intended to do it unilaterally prior to receiving the directive from the Commission?

A Well, it says here, and let me read from the third paragraph:

"A program of measuring the effect of this decision on remaining like positions in the Service has been undertaken with the utmost priority. Specifically in this regard, we have met with representatives of our office in order to more clearly understand and define the basis used in reaching this decision. Further, in order to maintain continuity, we have related this information, through personal discussions, to operating and management officials in each of the regional offices."

I suggest that that entire paragraph indicates that we had already been into it.

Q Well, sir, if you had in effect met with Civil Service Commission officers to discuss this program, how do you account for the fact that the Civil Service Commission sent you a letter requesting that you undertake certain actions?

THE COURT: I don't think he has to account for the Civil Service sending him a letter.

Q Mr. Ferro, you testified at great length regarding the basis for the report of the Civil Service Commission which was issued in 1964. I ask you, sir, if you are also familiar with a report of the Commission which was issued in 1968.

A A nationwide report?

Q A report of the Commission which is in evidence as PX 3, evaluation of personal management, U.S. Immigration and Naturalization Service.

MR. ADAMS: Can the document be shown to the witness?

THE COURT: Yes.

A Yes, I am familiar with this.

Q Were you also familiar with how this study by the Commission was undertaken?

A Yes. To the extent that I am familiar with the operations of the Civil Service Commission and their inspection from my viewpoint, it was done pretty much the same as every other nationwide inspection.

Q I direct your attention to Page 21 of that document, in which the Commission has found, and I quote:

"The Immigration and Naturalization Service was not meeting its responsibility under the Classification Act of 1949" -- then there is a citation to the United

States Code and it goes on -- "by carrying on a program which would assure the Commissioner and the Attorney General and the Civil Service Commission that its obligation to classify jobs accurately under Civil Service Commission standards would be met."

I ask you, sir, if you know what the basis for that statement was.

A I don't know what the basis of that statement was. But I have to believe that one of the things they were referring to were the large numbers of appeals that we have been discussing here that were fed into this report, since this report is a year later.

Q I also direct your attention to PX 2 in evidence, which is a letter from the Chairman of the Civil Service Commission to the Honorable Ramsey Clark, Attorney General of the United States, and in particular I invite your attention to the second to the last paragraph on Page 1, which reads, and I quote:

"A position classification system has been used to keep grades down for employees without regard to the actual level of work being performed. The agencies failure to operate an adequate and effective classification program has resulted in hundreds of employees filing classification appeals with the Civil Service Commission."

I ask you, sir, if you know what the basis for that statement was.

A No, I don't know what the basis for this statement was. But it is the result of a study -- I believe this is what transmitted the report, Exhibit 3. This is the letter that transmitted that report, I believe.

THE COURT: Is there any truth to the statement that hundreds of appeals have been filed?

THE WITNESS: By this date, no, I don't believe it was hundreds, your Honor.

THE COURT: Isn't that a substantial exaggeration as at that date?

THE WITNESS: Well, let me say this in defense of that statement. There were groups that followed onto this. There were groups of detention guards.

THE COURT: I'm not interested in what followed the date of that. This is a letter announcing a fact, and there is nothing that I have heard of or seen in the record as at this date that justified that extravagant statement.

Do you know of any support for it?

THE WITNESS: No, sir. There were not hundreds of appeals.

THE COURT: Who wrote that letter?

THE WITNESS: This is addressed to the Honorable Ramsey Clark and signed by John Macy, then Chairman of the Civil Service Commission.

MR. ROTHSTEIN: I would note that on Page 21 there is a listing of the various groups that filed appeals.

THE COURT: Were there hundreds of persons, hundreds of appeals?

MR. ROTHSTEIN: Well, there is a statement on Page 22 --

THE COURT: I am just asking you as to the numbers.

MR. ROTHSTEIN: According to the statement contained in here,it says on Page 21:

"Well over 300 appeals have been filed since April 1966 by employees from all sections of the country."

THE COURT: In the Immigration Service?

MR. ROTHSTEIN: In the Immigration Service, your Honor. And this is a report by the Civil Service Commission itself, and the cover letter, which I read to the witness, was written by none other than John W. Macy, Jr. the Chairman of the United States Civil Service Commission.

THE COURT: In other words, what this refers to, this goes beyond the New York Region, is that right?

MR. ROTHSTEIN: It goes beyond the New York Region and it goes beyond the occupation of investigators, criminal and general investigators.

THE COURT: Then there is something to it. I don't know.

THE WITNESS: If I may, your Honor, and perhaps to clarify this, they are counting, for example, as class action appeals a detention guard who would file an appeal on the occupation, for example.

Now, we have 150 detention guards. If a detention guard files an appeal and the basis for his appeal is that that standard, that level of the standard, is outdated and should be upgraded, they would count in that the entire group as individual appeals.

And the subject would not be what does the individual detention guard do but are we adequately compensating detention guards as an occupational group. Many of those appeals fell into that category.

I might also add that because we had so many appeals we were responding to a good number of people, including Congressmen, and a compilation by my office of the number of successful appeals was less than three percent.

So what we had, just to give you a little flavor of what was going on at that time, was a time during the Government Service and a time during the Civil Service Commission when people saw an initial group get a successful appeal and were general jumping in and filing an appeal, so it caused the Civil Service Commission havoc, as it did the Immigration Service. But I say that only three percent of those who appealed were successful.

Q How do you know that only three percent were successful?

A Because I personally computed the number of appeals we had and figured it out myself.

MR. ROTHSTEIN: I would move to strike the witness' statement. I think,if he is going to, if the government is going to allege that only three percent were granted, there should be documents to establish that.

THE COURT: He documented it with his personal activity and knowledge. Motion denied.

MR. ROTHSTEIN: I think the documents would be the best evidence.

Q Out of the 52 appellants who appealed in New York, do you know how many were ultimately upgraded, either through their classification appeals or through

administrative promotions, by the Immigration Service stemming from audits by the Service of the work they were doing?

A I can give you my best recollection, that it was 26.

Q 26 out of 52?

A Yes.

Q So that then is 50 percent that were found --

A If you count each appeal twice, which most of them were, I would say three times. They appealed first to us, and were denied. Many of them appealed first to the New York Region and were denied and then on re-appeal --

Q I'm referring to people, not to appeals. Of those 52 appellants, how many were found by either the Civil Service Commission or the Immigration Service --

A I believe 26.

Q 26.

A Yes.

Q Which is 50 percent.

A That is exactly 50 percent.

Q Mr. Ferro, as a result of the audits by Miss McLinn and Mr. Augustine in 1967, a number of individuals were upgraded by the Immigration Service, is

that correct?

A Yes, it is.

Q I would like you, sir, to look at four exhibits-- PX No. 27, DX L, M and N.

In particular, I first direct your attention to PX 27 and I ask you if those percentage figures there indicate the results of the 1967 audit which you testified about.

A Yes. I can't tell you at what juncture this was, but this is a list of percentage by title. It says,

"Percentage of Grade 12 investigatory category, work performed by Grade 11 investigators, March 1966 to March 1967."

Q I ask you now, sir, to look at DX N, the page with the date in the upper right-hand corner, of June 23, 1967.

A N?

Q N. And there are no page numbers, but there are dates in the upper right-hand corner.

A Yes.

Q My question relates to June 23, 1967.

MR. ADAMS: There are three pages with that date. Which one are you referring to?

MR. ROTHSTEIN: The file number on the top

I see is also repetitive.

MR. ADAMS: Are you referring to the one sent to the Northeast Region?

MR. ROTHSTEIN: Yes, I am. And, counting, it is the third page from the back. It is a memo from the Deputy Associate Regional Management Northeast Regional Office to the Associate Commissioner of Management Authorized Force.

Q Are you familiar with what this document represents?

A Yes, I am.

Q Can you tell me what this document does as far as the classification of people that are mentioned there?

A Yes. This is a bookkeeping function which causes the payroll system and the retirement system and every other system that has to do with positions and people, including budget, to change a position and a body in the position, if a body is in the position, from one grade to another or from one position to another.

Q Is it correct that this is the document which actually implemented the promotions which were brought about by the 1967 audit?

A Yes, this is the same document that would do

that.

Q And the results of the 1967 audit are found in PX 27?

A No, sir. This document, I can't attest to it being the same. This looks like a regional document, probably a worksheet.

THE COURT: What kind of sheet?

THE WITNESS: A worksheet that the teams would have been using and which they recorded --

Q They recorded their findings, did they not?

A Well, they record -- what it says here: "Percentage of Grade 12 investigations case work performed by Grade 11 investigators."

Q Based on those findings, I ask you whether or not it is true that every investigator whose name is mentioned on the page I referred to in DX N was found to be performing Grade GS-12 work for only 29 percent of his time.

A I'm sorry. I missed that someplace. Would you give me that again?

Q Let me repeat it.

I ask you, sir, first to look at the names which are mentioned.

A On which document?

Q In DX N, to wit Cooper Tarrant, Rhodes and Latchford.

A Yes.

Q And I ask you whether, based upon the findings exhibited in PX 27, each of those investigators was performing at grade GS-12 level during the period of the audit for only 29 percent of his time.

A I can only tell you that it says 29 percent of their time on this document NE 71-20, which is Exhibit 27, but I can't link this document to this action.

take

Q Well, perhaps we can assist you. I would like you to look at Exhibit L, and I ask you if you can link Plaintiff's Exhibit 27 to Defendant's Exhibit L by the file number which appears in the upper righthand corners of both documents.

A They have the same file number.

Q They both contain the number NE 71020I-P, do they not, and that is an Immigration file number?

A Yes they do. That would be a file number of a file maintained in Burlington, Vermont.

Q So that the two documents do bear the same internal file number, is that correct?

A Yes, they do.

Q Is it not also correct that Defendant's Exhibit L relates to the audit conducted by the Regional Office resulting in certain conclusions which are enumerated therein?

A Yes, sir.

Q Isn't it also true that Exhibit N, the page I showed you, which is dated June 23, 1967, refers to a recent evaluation of the classification review of grading GS-12 investigative work?

A Yes, it does.

Q Isn't that recent evaluation the very same audit

which is refered to in Exhibit L as the audit conducted by the Regional Office?

A Counsel, I can only tell you that they are both on the same subject, but whether this is the net result of this document, I cannot tell you that, because there is a good deal inbetween in time.

Q Was there any other evaluation made other than the one that is reflected in Plaintiff's Exhibit 27?

A Well, my recollection is, and perhaps that is what I'm missing and what I have not mentioned, my recollection is that when the field teams came back to Washington with their findings, we sat down again, of course, and we discussed again the evaluations we had made on each job, again to insure uniformity across the country in every position, and the findings of the teams were not limited to that by itself.

We got the benefit of everything that took place. For example, I do recall, it may be one of these positions but I can't say for sure, that we decided that liason work was not being adequately credited by the actual review of a case. There was nothing a man could really put in front of our survey teams to reflect high level liason. So when they came back into the Central Office, one of the things that we gave back to these people and discussed, again to get uniformity, was, are we giving proper credit to high level

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liason which altered upward the amount of grade 12 time some investigators had. So this document was not --

THE COURT: "This document," Exhibit L?

THE WITNESS: Exhibit L, was not the conclusion of the findings that resulted in this forced change being made in Exhibit No.

Q Do you know for a fact whether or not any of the findings of the auditors reflected in Plaintiff's Exhibit 27 were modified; do you know of any particular instance of modification?

A Well, I believe that the one name I can remember is Frank Latchford. And I can remember this because Mr. Latchford now works for me in Buffalo, and Exhibit N reflects that he worked in Buffalo at that time.

His was one of the positions that hadn't been given, in the initial survey, liason credit. So only that one specifically can I -- I can also remember George Fulner, who is shown in Exhibit 27 at St. Albans as also being a Montreal liason, in fact it is written on Exhibit 27, it says "Liason in Montreal" and it shows only four percent.

Mr. Fulner was the beneficiary of a good deal of high percentage of grade 12 because of his liason, so those two, I can recall.

Q Do you have any reason to believe that the

jklt 4 Ferro-cross

percentage figures found for Messrs. Cooper, Tarrant or Rhodes were changed?

A I don't recall that they were changed, but I wouldn't necessarily recall that.

Q Wasn't it a fact, Mr. Ferro, that when promotions were made in 1967 the Immigration Service in the Northeast Region promoted to GS-12 investigators who were performing grade 12 work for less than fifty percent of their time?

A No, sir, that was not a fact. The fact is, as I explained previously, that those who had a majority of time were reclassified, and where we had positions, where we had offices where we felt additional positions were necessary and no incumbent with fifty-one percent, we, with the permission of the Civil Service Commission, consolidated the remaining grade 12 work and reclassified the man with the highest percentage, though it was less than fifty-one percent.

Q Let's see if we understand each other. You did an audit, in order to determine how much work people were doing, in order to promote them if they were doing enough high level work?

A That was one part of the audit. The second part was to determine the total amount of grade 12 work in that office.

Q But the purpose, was it not, was to see that people who were doing more grade 12 work than they previously had been given credit for were in fact given credit for it and promoted where warranted?

A Yes, sir.

Q It was a promotion to be based on observation of what the men were doing, rather than other factors.

THE COURT: I thought he got through saying that it was a promotion based on the fact that there was nobody who fit the bill in particular offices so what they did was to consolidate a whole lot of other facts and give somebody a boost.

Now how many times do we have to go over the same thing?

MR. ROTHSTEIN: What I am trying to establish, your Honor, is the way they gave the man the boost was based on the work he was performing, not based on other factors.

THE COURT: What they did was to go out and find some basis to give him a boost when he didn't fit the bill.

MR. ROTHSTEIN: What I want to determine is what that basis was.

THE COURT: How many times do we have to? Beyond that you can argue it till the cows come home in your briefs, but the evidence has been now more than once and more

than twice repeated. I will let you ask it again for clarity, if you think that you have not heard it or that I have not heard it as to why people got grade 12 when they were doing less than fifty percent of the work in the initial evaluation.

Now, explain it to him once more and this is final.

THE WITNESS: Yes, sir.

The survey teams went out with the intent purpose of identifying first any investigator who was spending in excess of fifty percent of his time on higher level work.

And second, the total amount of grade 12 work in a given office. The action we took as a result of all of that was to reclassify those in the first category, those that had fifty-one percent, and with the blessing of the Civil Service Commission to treat the remaining need by consolidating the balance of the grade 12 work into full grade 12 positions, and reclassifying the individuals who had the next highest percentage but less than fifty-one percent.

Q When you made such promotions in the way you just mentioned, consolidating work, did you pick individuals who had the highest level; did you do it on a strict numerical basis, the highest level people in terms of percentage of time a GS-12 would get it?

A Yes, we took the findings and as I said, the man who had the next highest percentage or woman who had the next highest percentage, but less than fifty-one percent in an office where we set up an additional job by consolidating the work was the person we reclassified.

Q Well, when you say office, were you aware of the fact that in the New York District there were investigators who had been found by the Civil Service Commission to be performing grade 12 level work for forty percent of their time, who had their appeals denied, were you aware of the existence of such people?

A Well, I was aware of many of them having a percentage. I don't remember specifically forty percent, but yes, I'm aware of that.

Q Were there instances where you filled the positions created with men who had a lesser percentage of GS-12 work than the percentage which the Civil Service Commission had found for many other investigators whose appeals were denied and who were not promoted by the Immigration Service?

A Certainly not in New York there wasn't, but if you mean if there was a man in Los Angeles who had a lower percentage who was reclassified, I don't know.

Q Referring to New York, are you saying that there was no one who had a higher percentage of GS-12 level work

than the people that are shown as being promoted, on the document I showed to you, who was not also promoted to GS-12?

A I'm not sure I follow that. But I can tell you again we treated New York like we treated every other office, no difference, so in answer to your question, the man who had the highest percentage, if the position was set up, would have gotten the reclassification.

Q In considering who had the highest percentage, did you consider the findings of the United States Civil Service Commission made in conjunction with their audits?

A We considered the findings of the survey group which took as one of its considerations the liberal, what we considered a more liberal interpretation of the standards, so I would have to say we were incorporating the findings of the Civil Service Commission in our study.

Q Do you know, by the way, if Mr. Allen Vyse was promoted following the 1967 audit?

A I wouldn't know.

Q Would you know if Mr. Ellsworth Billier was promoted following the 1967 audit?

A No, I don't know.

MR. ROTHSTEIN: No further questions, your Honor.

MR. BARTH: Your Honor, I have three brief questions.

THE COURT: I know that you say a few and brief.

REDIRECT EXAMINATION

BY MR. BARTH:

Q Mr. Ferro, you had testified earlier that the Civil Service Commission sent a report of a survey that it conducted of the New York District Office to the Regional Commissioner, do you recall that?

A Yes, sir.

Q And in connection with that, I showed you Exhibit O, which is a letter to the District Director, the Immigration and Naturalization Service, 20 West Broadway, at New York, from a James P. Gooege, Regional Director. The covering page of it is a transmittal letter from Mr. Gdoege to the Regional Commissioner at the Immigration and Naturalization Service.

Do you recall me showing you that document before?

A Yes, sir, I do.

Q Would you look at it, please.

A Yes, I recognize this as an inspection report conducted some time in '63, transmitted in October of 1963.

Q Was that the exhibit that I showed to you during

your direct examination?

A Yes, it is.

Q I would like to show you Plaintiff's Exhibit 5, which is a report from James P. Gooege, Director of the New York Region, to Mr. Leonard Croin, Director of the Boston Region of the United States Civil Service Commission.

I would like you to look at the report and to tell me if the reports are different.

THE COURT: I don't know why you need a witness to tell you about whether the reports are different.

A Yes, this is a report, an internal report between offices of the Civil Service Commission; one office in New York to another office in Boston, I believe. It is a totally different report.

Q When did the Immigration Service receive that report, do you recall?

A It is my recollection we received this report in part, excerpts to begin with, and then perhaps a page at a time, some time in 1966.

Q When is the first time that you saw that report in its entirety?

A I never remember seeing it in its entirety prior to the time you showed it to me yesterday. It is not a report that would normally come to us.

Q If such a report had come to you, Mr. Ferro -- strike that question.

Mr. Ferro, let me show you Exhibit N which is in evidence, and I would like to know if you can identify that exhibit, or do you know who prepared it?

A Yes, sir. This is a compilation of the findings by the survey teams which when shook down and discussed and whatnot, resulted in us placing on paper the findings of the survey.

Q I am directing your attention to the portion of the report which is headed Northeast Region, New York District. The first column there, the number of positions -- what does that number mean?

A The number of positions means this is the number recommended by the survey team and that the service will recommend for reclassification.

Q Could you explain the flow of that chart from left to right?

A The location on the lefthand column indicates the district office in the Immigration Service, where the positions exist. The second column indicates the number of positions being recommended for grade 12 at that district office.

The next column indicates the investigators, it is

entitled, "Investigators to be Reclassified," and listed there would have been the names of the individuals who had a majority of time at grade 12 who had been found to have had a majority of time at grade 12.

Q How many such investigators were found in the New York area at that time that the chart was made up?

A This shows two. The last column shows investigators performing the next highest percentage, but less than fifty percent. And it lists in order of percentage the names of the individuals having that percentage.

Q There is no percentage stated on there, though, is there?

A No, sir.

Q So what did you base your statement on that that is listed in order of percentage?

A It is my recollection that we listed them that way because we had a view to taking the action I described earlier, reclassifying.

Q Mr. Ferro, do you recall specifically when the Immigration Service received notice that the first 11 GS-11s were going to be reclassified to GS-12?

A I don't recall the specific date, but I recall the instances which was receipt of the letter from the New York Region of the Civil Service Commission.

Q Showing the witness page 65 of Exhibit A, is that the letter that you received?

A Yes, sir, this is the letter from the New York Region of the Civil Service Commission advising us of their findings.

Q What is the date of that letter?

A February 1, 1967.

Q When did you have that meeting with Mr. Loughran a-d other people that you referred to?

A The day I received the letter.

MR. BARTH: Thank you. No questions.

THE COURT: Is that all?

MR. ROTHSTEIN: No further questions, your Honor.

THE COURT: Thank you very much. You are excused.

(Witness excused.)

THE COURT: We will recess now until tomorrow morning at 10 o'clock.

MR. ADAMS: Your Honor, that closes the defendant's case.

THE COURT: Is there any rebuttal?

MR. ROTHSTEIN: No rebuttal, your Honor.

THE COURT: Both sides rest?

MR. ADAMS: Yes, your Honor.

A-1015

NE 71/20-C
NE 71/20.7-C
December 15, 1967

District Directors: Boston, Buffalo, Hartford,
New York, Newark, Portland and St. Albans

A. A. Poulin, Jr., Assistant Regional Commissioner,
Administrative Services, Burlington

Civil Service Commission Procedures for Classification Appeals of
General Investigators

The attached copy of Civil Service Commission correspondence concerning procedures in handling General Investigator classification appeals is furnished for your information and dissemination.

In an effort to resolve at the District level as much of the detail as possible regarding the grade level evaluation of investigative cases assigned, the Commission will deal directly with management at the District Office. As in the past, please cooperate fully within the limits of your authority with the Commission in these matters. Copies of correspondence with the Commission in this regard should be sent to the Regional Office.

This procedure is not intended to change any existing procedures on classification appeals.

Attachment

DIST: 1-2

AAP:jm

A-1016

Developing information for use in adjudicating appeals filed by Investigators in the Immigration and Naturalization Service, Department of Justice

Nov. 27, 1967

IE:INF

Gilbert A. Schulkind
Director, Bureau of Inspections

Individually addressed to each
Regional Director

The large number of appeals filed by I&NS Investigators throughout the country makes it essential that the information needed to adjudicate these cases be developed as efficiently as possible since our resources are not sufficient to provide for individual desk audits in all cases. The Investigators and the I&NS should carry the major burden of providing the information needed to decide the appeals.

Based on our review of Investigator positions in the New York District Office, we think the following approach will furnish the information needed to act on the appeals and yet conserve our resources.

We suggest that the appellants be asked to furnish a summary of each of the cases they believe represents the highest level of difficulty and responsibility of their investigative assignment and which collectively have taken a preponderance (at least 50 percent) of their time over a reasonable period (e.g., a year). The Investigators should be asked to highlight the nature of each of these cases, indicate the reason the case is considered to reflect difficulty and responsibility characteristic of the GS-12 level of published standards, and specify the number of hours devoted to each of the cases.

You may find it helpful to include some specific instructions in your letters to appellants. For example, you might ask that they specify the nature of their participation in fraud cases. It is essential to know whether the Investigator developed the case, coordinated the investigations assigned to other Investigators and prepared the case for prosecution, or whether he worked only on individual cases of ring members as assigned. Similarly, in racketeer and subversive cases, it is important to know if the Investigator's participation was limited to up-dating the file through making a residence or other similar check, or involved really substantial investigative methods and techniques.

Upon receipt of the Investigator's case summaries, a review should be made to assure that they provide sufficient information. Those summaries found to be inadequate should be returned to the Investigator for amplification. Case summaries which present adequate information should be sent to a responsible official in the local district office with a request that he review the summaries and give an official I&NS position regarding them. The official might agree or disagree in whole or in part with the grade level evaluation placed on the cases by the Investigator. In instances of disagreement, the Service official should be asked to indicate briefly the basis for disagreement. This, of course, will be in addition to our usual request for the position description and is intended as an enlargement of the usually requested comments by the agency.

We have discussed the Investigator appeals situation with the Department of Justice. Department officials have told us that we can expect the cooperation of the Immigration and Naturalization Service in our efforts to promptly adjudicate the Investigator appeals.

IE:CHVanTassell:law 11/22/67

cc: Mr. Rosen
Mr. Yanak